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No. 10749

United States
Circuit Court of Appeals

VRL
2389

For the Ninth Circuit.

L. S. CASE, doing business as L. S. Case Company,
and TRAVELERS INSURANCE COM-
PANY, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sion of the Thirteenth Compensation District
under the Longshoremen's and Harbor Work-
ers' Compensation Act, and DAVID M.
YOUNG,

Appellees.

Apostles on Appeal .....	41

Upon Appeal from the District Court of the United States
for the Northern District of California,

Southern Division

FILED
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PAUL P. O'BRIEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

R. P. WISECARVER, ESQ.,

315 Montgomery Street,
San Francisco, California.

Proctor for Libelants and Appellants.

FRANK J. HENNESSY, ESQ.,

United States Attorney,
Northern District of California.

JAMES T. DAVIS, ESQ.,

Assistant United States Attorney,
Northern District of California.
Post Office Building,
San Francisco, California.

Proctors for Respondents and Appellees.

In the United States District Court for the
Northern District of California, Southern Division
In Admiralty

No. 23795G

L. S. CASE, doing business as L. S. Case Company,
and TRAVELERS INSURANCE COMPANY,
a corporation,

Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner of United States Employees' Com-
pensation Commission, for the 13th Compen-
sation District, under the Longshoremen's and
Harbor Workers' Compensation Act, and
DAVID M. YOUNG,

Respondents.

**LIBEL FOR REVIEW OF COMPENSATION
ORDER AND FOR INJUNCTION SUS-
PENDING AND SETTING ASIDE AWARD
UNDER LONGSHOREMEN'S AND HAR-
BOR WORKERS' COMPENSATION ACT.**

[1*]

To the Honorable, the Judges of the District Court
of the United States in and for the Northern
District of California, Northern Division, Sit-
ting in Admiralty:

The libel of L. S. Case, doing business as L. S.
Case Company, and Travelers Insurance Company,

*Page numbering appearing at foot of page of original certified
Transcript of Record.

a corporation, against Respondents, Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, and David M. Young, in a maritime action and petition for review of an amended compensation order, and for an injunction suspending and setting aside an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act, respectfully alleges:

I.

That the libelant, L. S. Case, at all of the times herein mentioned, was and now is doing business under the fictitious name of L. S. Case Company, and Travelers Insurance Company, at all the times herein mentioned, was and now is a corporation, and both of said libelants were lawfully carrying on business within the State of California, and within the 13th Compensation District, and within this District.

II.

That the libelant, L. S. Case, doing business as L. S. Case Company, is now and at all times mentioned, was an employer within the provisions of the Longshoremen's and Harbor Workers' Compensation Act, hereinafter referred to as the Act.

III.

That the libelant, Travelers Insurance Company is now and at all the times herein mentioned was, an insurance company licensed to insure employers against liability arising by reason of the provision

of said act, and was insurance carrier for the libellant, L. S. Case, doing business as L. S. Case Company, in accordance with the provisions of said Act on the date in question herein. [2]

IV.

That the respondent, Warren H. Pillsbury, at all the times herein mentioned was and now is the duly appointed, qualified and acting Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, under the provisions of said Act, with offices at San Francisco, California.

V.

That on October 1st, 1941, respondent David M. Young, while employed as a carpenter repairing the S.S. "West Portal" on the navigable waters of San Francisco Bay at Oakland, California, sustained a personal injury, occurring in the course of and arising out of his employment, when a foreign body entered his right eye, and resulted in the loss of 80% of the vision of said eye.

VI.

That workmen's compensation, pursuant to said Act, has been paid voluntarily for all temporary disability to the amount of \$503.57, and an award of one hundred and forty weeks compensation at \$25.00 a week, beginning as of February 19th, 1942, as and for the permanent partial disability of the loss of sight of said eye, was made by said Deputy Commissioner on February 12th, 1943, and is being

paid in accordance with the order contained in said award.

VII.

That in addition to the foregoing award, respondent, Warren H. Pillsbury, Deputy Commissioner, did, on February 12th, 1943, make and enter his findings and order and award, as follows:

“That by reason of said injury claimant has sustained, in addition to said loss of sight, serious facial and head disfigurement consisting in a large white spot across the pupil of said eye resembling a cataract and some narrowing of the aperture between the upper and lower eyelids of said eye. That just and equitable compensation therefor is \$750.00, which is payable [3] forthwith;

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

That the employer, L. S. Case Company, and the insurance carrier, The Travelers Insurance Company, shall pay to the claimant compensation as follows:

(1) To claimant the sum of \$750.00 forthwith for serious facial and head disfigurement;

* * *”

That the hearing before the said Deputy Commissioner was held on the 28th day of December, 1942, and the aforesaid compensation order and award for compensation was issued on the 12th day

of February, 1943; that a copy of the transcript of the proceedings, and exhibits at the hearing, are attached hereto as Exhibit "A", and a copy of the compensation order and award of compensation is also attached hereto as Exhibit "B", and by such reference said exhibits are made a part hereof as though fully set forth herein.

VIII.

That said compensation order and award of compensation is not in accordance with law and the provisions of the Act, in this:

That the additional award of \$750.00 on account of a large white spot across the pupil of the eyeball resembling a cataract, is without, beyond, and in contravention of the provisions of said Act; that the said large white spot across the pupil of the eyeball is not a serious facial or head disfigurement as said terms are used in the provisions of said Act; that the injury to the eye is fully compensated for according to the provisions of said Act by the award of one hundred and forty weeks of compensation as and for the permanent partial disability caused by [4] said injury to the eye; that the additional award for the white spot on the eyeball is a double recovery for the same injury; that by the provisions of said Act the loss of vision of an eye is the same as the loss of the member, and the loss of use of the eye is the same as the loss of the member, and the award is therefore in effect, a double recovery for the same disability, and contrary to the provisions of said Act; that

said award is without and beyond the power and jurisdiction of said Deputy Commissioner.

IX.

That the said compensation order and award of compensation *order and award of compensation* insofar as it awards an additional amount for a white spot on the eyeball, is not in accordance with law, and is contrary to the said Act, and the same should be suspended and set aside; that less than thirty days have elapsed since the date of entry of said order, and that the libelants have no plain, speedy or adequate remedy at law.

X.

That if libelants are compelled to pay said additional compensation as provided by said award, they will suffer irreparable damage; that if libelants are required to pay said compensation prior to the final determination of this action, it will allow respondent Young to disperse said fund prior to the determination thereof, and if this action should be determined in favor of libelants herein and the award set aside, libelants would have no remedy in law or in equity for the recovery of said payments of compensation so made in pursuance of said order; that in order to prevent irreparable damage to libelants it is necessary that said award of \$750.00 in a lump sum additional compensation, be stayed pending the outcome of the above-entitled action and the libelants are entitled to have said Deputy Commissioner restrained from enforcing

the payment of said award pending the outcome of said action. [5]

Wherefore, libelants pray as follows:

1. That respondent Warren H. Pillsbury as Deputy Commissioner, be ordered to certify to this court, his proceedings, findings and determination, and to certify the record of the proceedings, testimony and evidence, submitted at the hearing before him upon which the amended compensation order and award, dated February 12th 1943, was based.

2. That a mandatory temporary injunction issue herein restraining the enforcement of said compensation order and award of compensation of the lump sum payment of \$750.00 additional compensation, and that the payment of said amount required to be paid by libelants to respondent David M. Young, pursuant to the terms of said decree be entered by the court enjoining said Warren H. Pillsbury as Deputy Commissioner from enforcing the said payment as required by said award, and for such other, further and different relief as to the court may seem equitable and just.

3. That a time be fixed by the court for the hearing of this libel, and that the court proceed to hear the said cause de novo; that the respondents be required to appear at said hearing, and show cause if any they have, why a mandatory injunction should not issue herein suspending and setting aside the enforcement of said compensation order and award of compensation insofar as it awards the additional compensation of a lump sum of \$750.00

for alleged facial and head disfigurement; that the court proceed to take such evidence as is produced by the parties for the full consideration of the case de novo.

4. That a decree be entered adjudging said amended compensation order and award of compensation dated February 12th, 1943, a copy of which is attached hereto and made a part hereof, as Exhibit "B", to be unlawful and contrary to the provisions of said Longshoremen's and Harbor Workmen's Compensation Act, and directing that said amended compensation order and award of compensation be [6] suspended, annulled, vacated and set aside, and its enforcement enjoined insofar as it purports to make the award of compensation for serious facial and head disfigurement in the amount of \$750.00 in a lump sum, and for such other, further and different relief as to the court may seem equitable and just.

R. P. WISECARVER,

Proctor for Libelants.

R. P. Wisecarver

315 Montgomery Street

San Francisco, California.

Garfield 3740

United States of America,

State of California,

City and County of San Francisco—ss.

Otto Zeus, being first duly sworn, deposes and says: that he is an officer of The Travelers Insurance Company, one of the libelants in the above-

entitled action, to-wit: the Associate Manager thereof, and that as such he is authorized to verify the foregoing libel for review of compensation order; that he has read said libel and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated upon information or belief, and that as to such matters he believes it to be true.

OTTO ZEUS

Subscribed and sworn to before me this 4 day of March, 1943.

[Seal of the Notary]

ALICE C. MORSE,

Notary Public in and for the City and County of
San Francisco, State of California. [7]

EXHIBIT A

United States Employees' Compensation Commission,
Before Warren H. Pillsbury, Deputy
Commissioner, 13th Compensation District.

Case No. 2983-2

Claim No. 1780

DAVID M. YOUNG,

Claimant,

vs.

L. S. CASE COMPANY,

Employer,

TRAVELERS INSURANCE COMPANY,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, at the offices of the Commission, at Four Seventeen Market Street, San Francisco, California, on Monday, the 28th day of December, 1942, at 2:30 P. M.

Appearances:

Claimant, present in person.

Defendants, represented by R. P. Wisecarver, attorney-at-law.

Anita Smith, Reporter (Substituting for Mildred McColgan). [8]

Mr. Pillsbury: Hearing on claim for compensation, filed under the following circumstances:

Claimant received an injury in the course of his employment with defendant on October 1, 1941, which resulted in ulcer of the right eye.

Compensation was paid for temporary disability without award. Thereafter, after conference with the parties, I gave them informally my estimate of further compensation due for total loss of the sight of the eye, namely 140 weeks, at \$25.00 a week, beginning February 19, 1942. I understand that this rating has been accepted and payments are being made under it. However, I note in that rating that the condition of the eye was such that the impairment was much more visible than in the case of a glass eye, and called the attention of the parties to the possibility that claimant might be entitled to an additional allowance for serious facial disfigurement. As compensation is being paid, I did not hasten the development of this question, but have corresponded with defendants' attorney and with the Chief Counsel of the Commission, and received various citations of authorities upon this question of possible allowance for disfigurement.

The case came up on my call-up system recently and at an informal conference it appeared that an agreement could not be reached without award on this question. The claim was therefore taken and the claim now comes on regularly for hearing. [9]

Mr. Wisecarver, are you satisfied with the statement of the situation I have just made?

Mr. Wisecarver: Yes, that is substantially as I understand it.

Mr. Pillsbury: You agree that he is entitled to

compensation at \$25.00 a week for an injury occurring October 1, 1941, the period of temporary disability being to February 19, 1942 and thereafter for 140 weeks at \$25.00 a week for permanent loss of sight?

Mr. Wisecarver: I haven't computed the 140, but I think that is correct. In principle, that is correct, yes.

Mr. Pillsbury: And compensation has been paid to date for those two periods?

Mr. Wisecarver: I assume so. Hasn't it?

The Claimant: Yes.

Mr. Pillsbury: And was the temporary disability continuous from the date of injury to February 19th?

The Claimant: Yes.

Mr. Pillsbury: You were under compensation, were you, the whole time, Mr. Young, from October 1st to February 19th?

The Claimant: Yes.

Mr. Pillsbury: So the only question is whether the law authorizes an additional allowance for disfigurement.

Mr. Wisecarver: Yes. According to the statement that you made once before, that in looking at the eye you could see [10] there is some whiteness of the eyeball.

Mr. Pillsbury: In looking at him across the table, I notice a large white spot over the center of the right eye obscuring the pupil, which gives to any one seeing him immediate information that the right eye is blind.

Mr. Wisecarver: In that connection, for the purpose of the record, Mr. Pillsbury, is it conceded that in looking at the application, that the eye itself—that is, the orifice—is normal and what you are referring to refers only to the pupil of the eye itself?

Mr. Pillsbury: That's right. It is the appearance commonly seen where a large cataract completely obscures the pupil.

Mr. Wisecarver: It having to do only with the eyeball and not with the orifice or with any portion of the face itself.

Mr. Pillsbury: That is correct. Reference may be made to file for the authorities submitted by Mr. Wisecarver on this question and the authorities cited by the Commission's Chief Counsel.

Anything else?

Mr. Wisecarver: For the purpose of the record, do you think it would be of any avail to have that described technically by a doctor, or is it admitted that is the statement?

Mr. Pillsbury: I don't think so. Are you satisfied with [11] the description I just gave of the appearance of the eye, Mr. Young?

The Claimant: Yes, sir.

Mr. Wisecarver: And so far as the movement of the eye is concerned, it moves about as you look one way or the other with the other eye, without pain to you?

The Claimant: Oh, yes, there is no pain whatever.

Mr. Wisecarver: You have no pain with the eye, except that you don't see?

The Claimant: No.

Mr. Pillsbury: I notice you are blinking some with the eye. Why is that?

The Claimant: It throws a shadow. When I keep this eye closed, I see much plainer; but when I keep both eyes open it throws a shadow. I have two pairs of glasses, one long distance and one for reading.

Mr. Pillsbury: Both glasses are clear, are they?

The Claimant: I think they are.

Mr. Pillsbury: You don't wear a black patch, do you over the injured eye?

The Claimant: No.

Mr. Pillsbury: Or a black glass?

The Claimant: No. I can only just see through the one glass, but it is the only way I have been able to work.

Mr. Wisecarver: You can see same out of the injured eye, [12] can you?

The Claimant: Oh, no. That's the reason there is a shadow.

Mr. Wisecarver: You get the impression there is a shadow?

The Claimant: Yes, and it makes it bad to see that way. Dr. Irvine in the County Hospital told me I would never be able to see again.

Mr. Wisecarver: I was just wondering if it would be well to have a technical description of the eye?

Mr. Pillsbury: I don't think so, because the question of extent of facial disfigurement is more a question for laymen. If you want to file a photograph that fairly shows it——

Mr. Wisecarver: So long as it is conceded the face itself is not involved, it is purely the eyeball. Is that conceded, Mr. Young?

The Claimant: Yes.

Mr. Pillsbury: As I see him, the eyeball moves naturally and the eyelids are somewhat drawn together—the eyelids are not held as widely apart as for the good eye.

The Claimant: I couldn't open this eye for two or three months, you know. It had some stitches in it.

Mr. Pillsbury: The only items of disfigurement are the narrowness between the eyelids when open and the white spot on the pupil.

Mr. Wisecarver: I must confess I don't notice that. If [13] there is any difference it is very slight, because you can see the eyeball in both eyes.

Mr. Pillsbury: But not the pupil.

Mr. Wisecarver: But it opens the width of the pupil in both eyes approximately. Even in the good eye, it doesn't open quite wide enough to see the full colored portion of the good eye.

Mr. Pillsbury: By "pupil", I mean the dark spot in the center of the eye through which the

rays of light pass through the retina. The margins of that seem to be obscured by the scar tissue.

Mr. Wisecarver: Oh, yes, on the eyeball itself. I was thinking of the width of the eye there itself.

Mr. Pillsbury: Hearing closed?

Mr. Wisecarver: I think so.

Mr. Pillsbury: Hearing closed.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on December 28th, 1942.

(Signed) ANITA SMITH,

Reporter.

(Substituting for Mildred
McColgan) [14]

EXHIBIT B

United States Employees' Compensation
Commission

13th Compensation District

In the matter of the claim for compensation under
the Longshoremen's and Harbor Workers'
Compensation Act.

DAVID M. YOUNG,

Claimant,

against

L. S. CASE COMPANY,

Employer,

THE TRAVELERS INSURANCE COMPANY,
Insurance Carrier.CORRECTED COMPENSATION ORDER
AWARD OF COMPENSATION CASE No. 2983-2

Claim No. 1780

Such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 1st day of October, 1941, the claimant above named was in the employ of the employer above named at Oakland in the State of California in the 13th Compensation District, established under

the provisions of the longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by The Travelers Insurance Company;

That on said day claimant herein, while performing service for the employer as a carpenter on board the S.S. "West Portal", then undergoing repairs at Oakland, California, sustained personal injury occurring in the course of and arising out of his employment and resulting in disability as follows: While at work, a foreign body entered his right eye, causing an ulcer thereof and resulting in permanent disability and serious facial disfigurement;

That notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; [15]

That the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act;

That the average annual earnings of the claimant herein at the time of his injury exceeded the maximum of \$1950.00 prescribed by said Act;

That as the result of the injury sustained the claimant was wholly disabled from the date thereof to February 19, 1942, and he is entitled to 20-1/7 weeks compensation, \$25.00 a week, for such disability, amounting to \$503.57, which has been paid;

That claimant's disability reached a permanent stage on February 19, 1942. That by reason of said injury claimant has sustained permanent partial disability consisting in loss of over 80 per cent of

the sight of said eye, entitling him to compensation at \$25.00 a week for 140 weeks beginning with said February 19, 1942. That compensation has been paid thereon to the date of the last hearing, December 28, 1942, a period of 44-4/7 weeks, leaving 95-3/7 weekly payments still due claimant;

That by reason of said injury claimant has sustained, in addition to said loss of sight, serious facial and head disfigurement consisting in a large white spot across the pupil of said eye resembling a cataract and some narrowing of the aperture between the upper and lower eyelids of said eye. That just and equitable compensation therefor is \$750.00, which is payable forthwith;

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

That the employer, L. S. Case Company, and the insurance carrier The Travelers Insurance Company, shall pay to the claimant compensation as follows:

(1) To claimant the sum of \$750.00 forthwith for serious facial and head disfigurement;

(2) To claimant the sum of \$25.00 a week for 95-3/7 weeks commencing with December 28, 1942.

Given under my hand at San Francisco, California, this 12th day of February, 1943.

WARREN H. PILLSBURY

Deputy Commissioner

13th Compensation District

[Endorsed]: Filed Mar. 4, 1944. [16]

[Title of District Court and Cause.]

EXCEPTIONS OF RESPONDENT WARREN
H. PILLSBURY TO LIBEL IN PER-
SONAM TO ENJOIN COMPENSATION
ORDER

Now comes Respondent Warren H. Pillsbury and files his exceptions to the libel on file herein, and for grounds thereof, alleges:

I.

That the libel on file herein be dismissed for want of allegations showing that libelants are entitled to the [17] relief prayed for.

II.

That the libel on file herein be dismissed in that

(1) It does not appear from the face of said libel in what manner the Findings of Fact heretofore made by Respondent Pillsbury on February 12, 1943, are not supported by substantial evidence;

(2) It does not appear from the face of said libel in what manner the compensation award made by Respondent Pillsbury on the 12th of February, 1943, is not supported by substantial evidence;

(3) It does not appear from the face of the said libel in what manner the compensation award made by Respondent Pillsbury on the 12th day of February, 1943, is contrary to law.

Wherefore, Respondent Pillsbury prays that his exceptions to said libel be granted and that said

libel be dismissed and for such other relief that he may be entitled to receive in the premises.

FRANK J. HENNESSY,
United States Attorney,
Attorney for Respondent.

(Admission of Service.)

[Endorsed]: Filed June 3, 1943. [18]

[Title of District Court and Cause.]

R. P. WISECARVER,
315 Montgomery Street,
San Francisco, California,
Attorney for Libelants.

FRANK J. HENNESSY,
United States Attorney,
United States Post Office and Court House
Building,
Seventh & Mission Streets,
San Francisco, California,
Attorney for Respondent.

OPINION

Goodman, District Judge. [19]

This is a libel for review of a compensation order and for injunction suspending and setting aside an award under Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1424, 33 U.S.C.A. 901,

et seq. and involves construction of the compensation provisions of the Act. (33 U.S.C.A. 908).

Respondent Young lost the sight of his right eye because of the entry of a foreign body therein while employed on board ship. Respondent Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, awarded compensation for permanent partial disability, resulting from loss of sight of Respondent Young's right eye, under subdivision (c) (5) of Section 908, 33 U.S.C.A. In addition he awarded the sum of \$750.00, for serious facial disfigurement, under subdivision (c) (20) of Section 908.

Upon the issue of facial disfigurement, the Deputy Commissioner found: "that by reason of said injury claimant has sustained, in addition to said loss of sight, serious facial and head disfigurement consisting in a large white spot across the pupil of the eye resembling a cataract and some narrowing of the aperture between the upper and lower eyelids of said eye."

Respondent Young's employer and its insurance carrier, as libelants, join in the prayer that the Deputy Commissioner's award of \$750.00 under subdivision (c) (20) of Section 908 be set aside upon the ground that the award constitutes a double recovery, inasmuch as for the same injury and loss of the sight of the eye, respondent Young was awarded both disability and disfigurement damages. [20]

Subdivision (c) (20) of Section 908 provides:

"Disfigurement: The deputy commissioner

shall award proper and equitable compensation for serious facial and head disfigurement not to exceed \$3500.00."

It is contended by libelants that the intent of subdivision (c) (20) Section 908 is to provide compensation in the case of head or facial disfigurement only when there is no compensation allowed for injury to the same member of the head; that here the disability compensation allowed for the loss of the use of the eye ball includes any damage to the eye ball itself and excludes any other award for it.

The sufficiency of the evidence to sustain the award under subdivision (c) (20) of Section 908 is not questioned; therefore the finding that respondent Young did suffer severe facial or head disfigurement is final and conclusive and not subject to review in this court. *South Chicago Coal & Dock Co. v. Bassett*, Deputy Commissioner, 309 U. S. 251, at page 258; *Luckenbach S.S. Co. v. Norton*, Deputy Commissioner, (3 Cir.) 96 Fed. (2d) 764.

Both sides agree that the sole question is as to the scope of Section 908 Subdivision (c) (20) of the Act. It is claimed that there is no reported decision of the Federal Courts in point.

The Longshoremen's and Harbor Worker's Compensation Act was modeled after the New York law. The deputy Commissioner has cited several New York State lower court decisions wherein compensation for facial disfigurement was allowed concurrently with disability compensation for loss of use of the same member of the head. Some weight

may be given to the New York decisions because of the recognized rule of construction that the adoption of a statute of another jurisdiction carries with it the construction placed [21] upon it prior to its adoption. In *Marshall, Deputy Commissioner v. Andrew Mahony Co.* (9 Cir.) 56 Fed. (2d) 74, the Court, after referring to the fact that the Longshoremen's and Harbor Worker's Compensation Act was adopted from the Workmen's Compensation law of New York (Cons. laws New York, c. 67) stated "that in so adopting the act the Congress intended to adopt the construction theretofore placed upon it by the courts of the state of its enactment." To the same effect, *Luckenbach S. S. Co. v. Marshall* (9 Cir.) 49 Fed. (2d) 625; *Bethlehem Ship Building Corporation v. Monahan*, (1 Cir.) 54 Fed. (2d) 349.

More persuasive, however, is the argument that sound and logical interpretation of the statute itself supports the Deputy Commissioner's decision. Subdivision (c) (20) of Section 908 is one of a series of enumerated classifications within section 908 (c), wherein compensation for partial disabilities is to be awarded. Each of the enumerated partial disabilities, e. g. loss of arm, loss of leg, loss of hand, loss of eye, etc. cannot reasonably be considered as exclusive of any other, since an employee might lose the use of an arm and of a leg and still receive compensation severally for each disability. Section 908 (c) (22) specifically so provides. Further, the same subdivision allows such awards to run consecutively where permanent partial disabil-

ity results from the loss of use of separate members of the body.

In order to determine the real intent and purpose of the Congress, the whole section must be considered. As was said in *Marshall v. Mahony*, *supra*: "to arrive at its proper meaning and application, Section 10 (the section there in question) must be taken in its entirety and its [22] true meaning be ascertained by giving due weight and consideration to all parts of the section in the light of the general aims and objects of the statute taken as a whole." (Comment in parenthesis supplied.)

The framers of the statute obviously considered facial disfigurement as an element of damage separate and apart from disability resulting from the various classified types of injuries. In my opinion, it was not intended that an employee should be denied an award for disfigurement merely because his disability and disfigurement, by happenstance, are concurrent. Otherwise the inconsistent result might be reached whereby an employee would receive compensation for the loss of an eye and damages for the disfigurement of an ear, but nothing for disfigurement if the two misfortunes occurred in the same member of the head. Clearly, it was intended to allow compensation for the handicaps caused by personal unsightliness, separately and in addition to the disability causing loss of use of a member of the body or head.

The Longshoremen's and Harbor Worker's Compensation Act is a remedial statute and hence must be liberally construed. *Baltimore & Philadelphia*

S. S. Co. v. Norton, 284 U. S. 408; De Wold v. Baltimore & Ohio R. R. Co. (4 Cir.) 71 Fed. (2d) 810; Travelers Ins. Co. v. Branham, (4 Cir.) 136 Fed. (2d) 873.

The exceptions to the libel are sustained and the libel is dismissed.

Dated: September 24, 1943.

[Endorsed]: Filed Sept. 24, 1943. [23]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled proceeding came on regularly to be heard on the 30th day of October, 1943, R. P. Wisecarver, Esq., appearing for libelants, and James T. Davis, Esq., Assistant United States Attorney appearing for respondent Warren H. Pillsbury, Deputy Commissioner for the 13th Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, the hearing being had upon the libel incorporating the entire record and transcript of the hearings before the respondent in the compensation matter [24] herein complained against by libelants and upon the exceptions of the respondent herein to said libel and briefs, and the matter having been submitted for consideration and decision, now, after due deliberation, the court finds generally in favor of the respondent and against the

libelants on the issue raised by the respective pleadings and further finds as follows:

FINDINGS OF FACT

I.

That on the first day of October, 1941, the claimant David M. Young, was in the employ of the L. S. Case Company at Oakland, in the State of California, in the 13th Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Act, and that the liability of the employer for compensation under said Act was insured by The Travelers Insurance Company;

II.

That the said claimant, David M. Young, while performing service for the employer as a carpenter on board the SS West Portal, then undergoing repairs at Oakland, California, sustained personal injury occurring in the course of and arising out of his employment and resulting in disability as follows: While at work a foreign body entered his right eye causing an ulcer thereof and resulting in permanent disability and serious facial disfigurement; [25]

III.

On December 16, 1942 a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act was filed with the Respondent Deputy Commissioner, and hearing had in conformity with law. On February 12, 1943 said Respondent Deputy Commissioner made a compensation

award in favor of said David M. Young as claimant, finding that the claimant's disability reached a permanent stage on February 19, 1942, and that by reason of said injury claimant sustained permanent partial disability consisting in the loss of over 80 percent of the sight of his eye entitling him to compensation at \$25.00 a week for 140 weeks beginning with said February 19, 1942. Respondent Commissioner further found that by reason of said injury claimant sustained in addition to said loss of sight serious facial and head disfigurement consisting in a large white spot across the pupil of said eye resembling a cataract and some narrowing of the aperture between the upper and lower eyelids of said eye, and that just and equitable compensation thereof was \$750.00.

CONCLUSIONS OF LAW

I.

The compensation order-award of February 12, 1943, Case No. 2983-2, Claim No. 1780 before the United States Employees Compensation Commission for the Thirteenth Compensation District, (in which David M. Young is claimant and L. S. Case Company, libelant herein, is the employer, and The Travelers Insurance Company, a corporation, libel- [26] ant herein, is the insurance carrier), is in accordance with law and is supported by substantial evidence.

II.

That claimant, David M. Young, by reason of said injury sustained permanent partial disability consisting in loss of over 80 percent of the sight of his right eye and in addition to said loss of sight sustained serious facial and head disfigurement.

III.

That respondent is entitled to have the compensation order-award of February 12, 1943, affirmed, the Motion for an Injunction denied and the libel dismissed.

Dated: This 2nd day of December, 1943.

(Sgd.) LOUIS E. GOODMAN,
United States District Judge.

Approved as to form as provided in Rule 22.

R. P. WISECARVER,
Attorney for Libelants.

[Endorsed]: Filed Dec. 3, 1943. [27]

In the United States District Court for the Northern District of California, Northern Division.

No.23795-G

L. S. CASE, doing business as L. S. Case Company,
and TRAVELERS INSURANCE COMPANY, a corporation,

Libelant,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of United States Employees' Compensation Commission, for the 13th Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and DAVID M. YOUNG.

Respondents.

DECREE

This cause came on regularly to be heard in the above entitled Court on the 30th day of October, 1943, the Honorable Louis E. Goodman, United States District Judge, presiding, at which time this matter was submitted on the libel on file herein and Respondent's Exceptions to said libel and upon briefs filed by both parties, and upon a certified copy of the transcript of the proceedings before [28] Respondent Pillsbury sitting as Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, and upon Libelant's Motion for a Mandatory Injunction, and the Court having considered the law and the evidence, and having made its Findings of Fact and Conclusions of Law herein,

Now, Therefore, It Is Ordered, Adjudged and Decreed as follows:

That the libel heretofore filed on behalf of libelant above named be and the same is hereby dismissed without leave to amend;

That the Motion for Mandatory Injunction heretofore filed on behalf of the libelant above named be and the same is hereby denied;

That the compensation award of Respondent dated and filed the 12th day of February, 1943 directing Libelant above named to pay David M. Young as claimant the sum of \$750.00 forthwith for serious facial and head disfigurement, and the sum of \$25 a week for 95-3/7 weeks commencing December 28, 1942, be and the same is hereby affirmed;

That each party will pay its own costs.

Done in Open Court this 18th day of February, 1944.

LOUIS E. GOODMAN,
United States District Judge.

Approved as to form as provided in Rule 22.

R. P. WISECARVER.

Entered in Vol. 34 Judg. and Decrees at Page 226.

[Endorsed]: Filed Feb. 18, 1944. [29]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL
[30]

The Libelants, L. S. Case, doing business as L. S. Case Company and Travelers Insurance Company, a corporation, each believing itself aggrieved by the Decree of the Court made and entered on the 18th day of February, 1944, wherein and whereby the libel and bill of complaint for injunction was denied herein, hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith and your petitioners respectfully pray that this appeal may be allowed, that a citation be issued directed to the above-named respondents, Warren H. Pillsbury and David M. Young, as provided by law, and that a transcript of record and proceedings upon which said decree was based, be duly authenticated and sent to the Circuit Court of Appeals for the Ninth Circuit.

L. S. CASE, doing business as
L. S. Case Company, and
TRAVELERS INSURANCE
COMPANY, a corporation,
By R. P. WISECARVER
Their Proctor.

Receipt of copy of the above Petition for allowance of appeal is hereby acknowledged this 17th day of March, 1944.

FRANK J. HENNESSY

Per T.S.

Proctor for Respondents.

[Endorsed]: Filed Mar. 17, 1944. [31]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL [32]

The Petition of the libelants in the above-entitled cause for the allowance of the appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby allowed, the appellants to file a bond in the sum of Two Hundred Fifty Dollars, to be approved by the undersigned Judge and conditioned as a bond for costs of appeal in said Circuit Court of Appeals.

It is further ordered that a copy of this allowance of appeal, certified by the Clerk to be such, may be served upon the Attorney and Proctor for respondents in lieu of personal service.

Done this 17th day of March, 1944.

A. F. ST. SURE

Judge

Receipt of a certified copy of the foregoing order allowing appeal is acknowledged this 17th day of March, 1944.

FRANK J. HENNESSY

Per T.S.

Proctor for Respondents.

[Endorsed]: Filed Mar. 17, 1944. [33]

[Title of District Court and Cause.]

COST BOND ON APPEAL [34]

Know All Men by These Presents, that Globe Indemnity Company, a corporation, duly organized and existing under the laws of the State of New York, and duly authorized and qualified to do business within the State of California, for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the United States of America, or of the State of California, is held and firmly bound unto Warren H. Pillsbury, as Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, and unto his successors in such office, and unto David M. Young, in the penal sum of Two Hundred Fifty (\$250) Dollars for the payment of which, well and truly to be made unto the said respondents, or their said successors, and personal representatives respectively, the said Globe Indemnity Company hereby binds itself, its successors and assigns, firmly by these presents.

Signed and sealed at San Francisco, California, this 17th day of March, A. D. 1944.

The condition of the foregoing obligation and undertaking is such, that whereas the above named libelants, L. S. Case doing business as L. S. Case Company and Travelers Insurance Company, a corporation, in the above entitled suit have appealed and are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and decree made and entered in the above entitled court and cause, on February 18th, 1944, ordering and decreeing a dismissal of said libel; and dismissing the same at the cost of both parties;

Now, Therefore, if the said L. S. Case doing business as L. S. Case Company and Travelers Insurance Company, a corporation, shall prosecute their said appeal to effect and answer all costs which may be awarded or adjudged against them or either of them, if they fail to make good their said appeal, then this obligation shall be void; otherwise to remain in full force and effect, and [35] in case of any breach of said condition, it is expressly agreed that the said District Court may, upon notice to this obligor of not less than ten days, proceed summarily in the above entitled suit to ascertain the amount which it is bound to pay on account of such breach and render judgment against this obligator therefor and award execution thereon.

In Witness Whereof, these presents have been executed by the attorney in fact of said obligator thereunto duly authorized and the seal of said

obligator affixed, upon the day and year hereinabove written.

GLOBE INDEMNITY COM-
PANY

By A. J. CLEFFI

Its Attorney in Fact.

Premium Charge for this Bond is \$10.00 per annum.

The foregoing bond is hereby approved this 17th day of March, 1944.

A. F. ST. SURE

United States District Judge.

[36]

State of California,

City and County of San Francisco—ss.

On the 17th day of March, before me Thomas A. Dougherty, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared A. J. Cleffi, Attorney in Fact of the Globe Indemnity Company, a corporation, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same and also known to me to be the person whose name is subscribed to the within instrument as Attorney in Fact of said corporation, and he acknowledged to me that he subscribed the name of said Globe Indemnity Company thereto as principal and his own name as Attorney in Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

THOMAS A. DOUGHERTY

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Aug. 10th, 1947.

Received copy of the within Cost Bond this 17th day of March, 1944.

FRANK J. HENNESSY

Per T.S.

Proctor for Respondents.

[Endorsed]: Filed Mar. 7, 1944. [37]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS [38]

Now come the libelants in the above entitled cause, by their proctor and in connection with their petition for appeal, assign the following errors in the decree of this court entered February 18th, 1944.

I.

That the United States District Court for the Northern District of California erred in making and entering the decree dated February 18th, 1944 denying the libelants application for mandatory injunction to restrain the order for compensation of respondent, Warren H. Pillsbury, as prayed in its libel.

II.

That the said Court erred in sustaining the respondent, Warren H. Pillsbury's exceptions to libelants libel and confirming the compensation order to respondent David M. Young, made and filed on the 12th day of February, 1943, and in denying the motion for injunction filed by libelants in said action.

III.

That the said Court erred in refusing to enter a decree herein declaring that said compensation order of the respondent Warren H. Pillsbury described in the libelants' complaint, was not in accordance with the law, and that the same be vacated and set aside.

IV.

That the said Court erred in affirming the compensation award of respondent Warren H. Pillsbury, dated and filed the 12th day of February, 1943, directing libelants above named to pay David M. Young, as claimant, the sum of Seven Hundred Fifty (\$750) Dollars forthwith for serious facial and head disfigurement, and the sum of Twenty-five (\$25) Dollars a week for 95 $\frac{3}{7}$ weeks, commencing December 28th, 1942.

IVa.

That the said Court erred in finding and decreeing that respondent David M. Young sustained a personal injury from a foreign body entering his right eye [39] causing an ulcer thereof and resulting in permanent disability and serious facial disfigurement, within the meaning of the terms per-

manent disability and serious facial disfigurement, as said terms are used and defined in the Longshoremen's and Harbor Workmen's Compensation Act.

V.

That said Court erred in finding and decreeing that said David M. Young sustained a loss of over 80% of the sight of his right eye and in addition to said loss of sight, sustained serious facial and head disfigurement, as said terms loss of sight and serious facial and head disfigurement are defined and used in the Longshoremen's and Harbor Workmen's Compensation Act.

VI.

That said Court erred in failing to find and decree that respondent David M. Young was fully compensated for his injury arising out of and in the course of his employment, when he was compensated for the total loss of use of the eye, and that he was not entitled to additional compensation for a blemish on the surface of the eyeball, pursuant to the provisions of the Longshoremen's and Harbor Workmen's Compensation Act.

R. P. WISECARVER

Proctor for Libelants.

Receipt of copy of the above Assignment of Errors is acknowledged this 17th day of March, 1944.

FRANK J. HENNESSY

Per T.S.

Proctor for Respondents.

[Endorsed]: Filed Mar. 17, 1944. [40]

[Title of District Court and Cause.]

APOSTLES ON APPEAL [41]

To the Clerk of the above-entitled Court:

You will please make up, certify, and file a transcript of the record in the above-entitled cause upon the appeal thereof to the Circuit Court of Appeals for the Ninth Circuit, and incorporate therein the following:

Libel for review of compensation order and for injunction suspending and setting aside award under Longshoremen's and Harbor Workers' Compensation Act, and including therein Exhibit A, being a transcript of testimony before Warren H. Pillsbury, Deputy Commissioner, and Exhibit B, being the corrected compensation order, award of compensation, Case No. 2983-2, Claim No. 1780.

Exceptions of respondent Warren H. Pillsbury to Libel.

Opinion by Goodman, District Judge, dated February 24, 1943.

Findings of Fact and Conclusions of law by Goodman, Judge.

Decree, dated February 18th, 1944, by Goodman, Judge.

The following papers filed on or about March 17th, 1944:

Petition for allowance of appeal.

Order allowing appeal.

Cost bond on appeal.

Citation and admission of service.

Assignment of errors.

Clerk's certificate to transcript of record.

Apostles on Appeal.

Dated: March 17, 1944.

R. P. WISECARVER

Proctor for Libelants

Received copy of the within Apostles on appeal
March 17th, 1944.

FRANK J. HENNESSY

Per T.S.

Proctor for Respondents.

[Endorsed]: Filed Mar. 17, 1944. [42]

[Title of District Court and Cause.]

TRANSCRIPT OF RECORD

United States Employees' Compensation
Commission

13th Compensation District

In the matter of the claim for compensation under
Longshoremen's and Harbor Workers' Com-
pensation Act

Case No. 2983-2

Claim No. 1780

DAVID M. YOUNG,

Claimant,

against

L. S. CASE COMPANY,

Employer.

THE TRAVELERS INSURANCE COMPANY,
Insurance Carrier.

CERTIFICATION

This is to certify that I am the duly appointed, qualified and acting Deputy Commissioner of the United States Employees' Compensation Commission under the Longshoremen's and Harbor Workers' Compensation Act, for the Thirteenth Compensation District, comprising the State of California and other portions of the United States:

That there has recently been pending before me as said Deputy Commissioner, a claim for compen-

sation under said Act of David M. Young against L. S. Case Company, employer, and The Travelers Insurance Company, insurance carrier, my file No. 2983-2.

That the attached are originals or true and correct copies of pleading, transcripts of testimony, and exhibits in said file, as listed below, being a copy of the entire file therein as far as relevant to a review of the above proceedings:

1. US-203, Copy of Employee's Claim for Compensation [43]
2. Transcript of Testimony of December 28, 1943
3. Corrected Compensation Order, Award of Compensation, dated February 12, 1943.

Given under my hand at San Francisco, California, this 13th day of March, 1943.

WARREN H. PILLSBURY

Deputy Commissioner

13th Compensation District

[44]

United States Employees' Compensation
Commission

Office of Deputy Commissioner Warren H. Pillsbury,
13th Dist. Administering Longshoremen's and Harbor Workers' Compensation Act
Leave This Space Blank
Case No. 2983-2
Insurance Carrier's
No. 40

Employee's Claim for Compensation

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law.)

Injured

Person

1. Name of employee David M. Young
Employee's Check No.
2. Address: Street and No. 319 Third Street
City or town San Francisco, Calif.
3. Sex Male Age 60 Married, single, widowed
Single
4. Do you speak English? Yes
Nationality Scotch-American
5. State regular occupation Shipwright
6. What were you doing when injured? Putting
down linoleum on captain's cabin
7. (a) Wages or average earnings per day, \$11.00
(Include overtime, board, rent, and other al-
lowances.) (b) Per week, \$.... (c) Were you
employed elsewhere during week in which you
were injured? (d) If so, state where and
when
8. Were you paid full wages for day of accident?
No. [45]

Employer

- 9 Employer L. S. Case Company.
10. Office address: Street and No. 7th & Daggett
Sts. City or town San Francisco, Calif.
11. Nature of business Ship Servicing

The

Injury

12. Place where injury occurred on board S.S.
"West Portal, in Oakland, Pier 7
13. Name of foreman Glen T. Gray

14. Date of accident or first illness, the 1st day of October, 1941, at o'clock . . M.
15. How did accident happen or how was occupational disease caused? While putting down linoleum on floor, some sand and white lead got into right eye.

Nature and Effect
of Injury

16. State fully nature or injury or occupational disease:
(1) Loss of sight, right eye. (2) Serious facial and head disfigurement.
 17. On what date did you stop work because of injury? Possibly the next day, 192..
 18. Have you returned to work? (Yes or No.)
Yes. If "yes", on what date? Intermittently, 192..
 19. Does injury keep you from work? (Yes or No.) No. Not entirely. Can do some form of work.
 20. Have you done any work in period of disability? Yes.
 21. Have you received any wages since injury?
Yes. If so, from and to what date?
 22. Has injury resulted in amputation? No. If so, describe same
 23. Did you request your employer to provide medical attendance? Yes. Has he done so? Yes.
- [46]
24. Attending physician: Name S. F. Boyle & Dr. Carman Address Now in Army

25. Hospital: Name County Hosp. & Dante Hosp.
Address San Francisco, Calif.

Notice

26. Have you given your employer notice of injury? (Yes or No.) Yes When? Next day, 192..

27. If such notice was given, to whom?

28. Was it given orally or in writing? Orally

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by DAVID M. YOUNG

Claimant.

Mail address 319 Third Street
San Francisco, Calif.

Dated Filed Dec. 16, 1942 j

Dated: December 16, 1942. [47]

(Here Follows Corrected Compensation Order Award of Compensation Case No. 2983-2 Claim No. 1780 Copied as "Exhibit B" Attached to Libel for Review of Compensation Order and for Injunction Suspending and Setting Aside Award Under Longshoremen's and Harbor Workers' Compensation Act)

(Certificate of Mailing)

(Here Follows a Transcript of Testimony at Hearing Before Warren H. Pillsbury, Deputy Com-

missioner, United States Employees' Compensation Commissioner, December 28, 1942, Copied as "Exhibit A" Attached to Libel for Review, Etc.)

(Endorsed) Filed Mar 30 1944 [48]

[Title of District Court and Cause.]

COUNTER DESIGNATION OF
APOSTLES ON APPEAL

To the Clerk of the above entitled Court:

You will please cause to be made up, certified and filed in the above entitled court and cause in addition to the parts of the record already requested by the libelant that part of the transcript of record already requested by the libelant that part of the transcript of record in the above entitled cause as follows:

1. Transcript of the testimony taken before Respondent Deputy Commissioner Warren H. Pillsbury, and any exhibits annexed thereto, particularly "Employees Claim for Compensation" together with Deputy Commissioner's certification thereof;
2. Notice of entry of judgment.

Dated: This 6th day of April, 1944.

FRANK J. HENNESSY

United States Attorney.

(Receipt of Service.)

[Endorsed]: Filed Apr. 7, 1944. [49]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 49 pages, numbered from 1 to 49, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of L. S. Case, etc., et al., Libelants, vs. Warren H. Pillsbury, etc., et al, Respondents, No. 23795 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Eight Dollars and Twenty-five Cents (\$8.25) and that the said amount has been paid to me by the Attorney for the appellant herein.

And I Further Certify that annexed hereto is the Original Citation and Admission of Service.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 21st day of April A. D. 1944.

[Seal]

C. W. CALBREATH,
Clerk.

By E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

CITATION AND ADMISSION OF SERVICE

The United States of America to the respondents Warren H. Pillsbury, Deputy Commissioner of the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and David M. Young, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Ninth Circuit, to be holden at the Post Office Building, in the City and County of San Francisco, State of California, within forty (40) days from the date hereof, pursuant to a petition for appeal filed in the Clerk's office of the District Court of the United States, for the Northern District of California, Southern Division; wherein L. S. Case, doing business as L. S. Case Company, and Travelers Insurance Company, a corporation, are the libelant-appellants and Warren H. Pillsbury, Deputy Commissioner for the 13th Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and David M. Young are the respondent-appellees, to show cause, if any there be, why the decree in said petition for appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the City and County of San Francisco, in the District and Circuit aforesaid, this 17th day of March, 1944, and the inde-

pendence of America the One Hundred and Sixty-Eighth year.

A. F. ST. SURE,
U. S. District Judge for the Northern District of
California, Southern Division.

Receipt of copy of the within citation and admission of service is hereby acknowledged this 17th day of March, 1944.

FRANK J. HENNESSY

Per T. S.

Proctor and Attorney for
Respondents.

[Endorsed]: Filed Mar. 17, 1944.

[Endorsed]: No. 10749. United States Circuit Court of Appeals for the Ninth Circuit. L. S. Case, doing business as L. S. Case Company, and Travelers Insurance Company, a corporation, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and David M. Young, Appellees. Apostles on Appeal. Transcript of Record Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 24, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals for the Ninth
Judicial Circuit of the United States of America

No. 10749

L. S. CASE, doing business as L. S. Case Company,
and TRAVELERS INSURANCE COMPANY
a corporation,

Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner of United States Employees' Compensa-
tion Commission, for the 13th Compensation
District, under the Longshoremen's and Harbor
Workers' Compensation Act, and DAVID M.
YOUNG,

Respondents.

STATEMENT OF POINTS ON APPEAL

Libelants hereby adopt and make a part hereof
as if incorporated herein as its statement of points
on appeal those specifications, designations and ob-
jections present and stated in its Assignment of
Errors on file herein, copy of which has been here-
tofore served on Proctor for Respondents.

Dated: April 24th, 1944.

R. P. WISECARVER,
Proctor for Libelants.

Received copy of the within Statement of Points
on Appeal May 2, 1944.

FRANK J. HENNESSY,
Proctor for Respondents.

[Endorsed]: Filed May 2, 1944. Paul P. O'Brien,
Clerk.

No. 10,749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

L. S. CASE, doing business as L. S. Case
Company, and TRAVELERS INSURANCE
COMPANY (a corporation),

Appellants,

VS.

WARREN H. PILLSBURY, Deputy Commis-
sioner of the Thirteenth Compensation
District under the Longshoremen's and
Harbor Workers' Compensation Act, and
DAVID M. YOUNG,

Appellees.

BRIEF FOR APPELLANTS.

R. P. WISECARVER,

315 Montgomery Street, San Francisco,

Proctor for Appellants.

FILED

JUL 5 - 1941

PAUL P. O'BRIEN,
CLERK

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No. 10,749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

L. S. CASE, doing business as L. S. Case
Company, and TRAVELERS INSURANCE
COMPANY (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner of the Thirteenth Compensation
District under the Longshoremen's and
Harbor Workers' Compensation Act, and
DAVID M. YOUNG,

Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF JURISDICTION.

The libel, filed in the district court on March 4, 1943, was to review a compensation order of a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C.A., sec. 901 et seq. (Ap. 2-20.) The injury occurred in the district (Ap. 4) and the order was made February 12, 1943 (Ap. 5-6, 20). The district court therefore had jurisdiction of the libel. 33 U.S.C.A., sec. 921 (b). A final decree dismissing the libel and affirming the order of compensation was entered February 18, 1944.

(Ap. 31-32.) Petition for allowance of appeal to this court and order allowing the appeal were filed March 17, 1944. (Ap. 33-34.) This court therefore has jurisdiction upon appeal to review the said decree under section 128 of the Judicial Code. 28 U.S.C.A., sec. 225.

STATEMENT OF THE CASE.

The libelants were an employer and his insurance carrier. (Ap. 3-4.) The respondents were a deputy commissioner under the said Act, and an employee to whom the deputy commissioner had awarded compensation for injury. (Ap. 4.) A copy of the transcript of testimony of the hearing before the deputy commissioner (Ap. 11-17) and a copy of his findings and award (Ap. 18-20) were annexed to the libel as exhibits. These findings recited that while the employee was working as a carpenter on board the S.S. "West Portal", then undergoing repairs at Oakland, California, a foreign body entered his right eye on October 1, 1941, causing an ulcer thereof and resulting in permanent disability and serious facial disfigurement". (Ap. 18-19.) Further recitals were as follows:

"That claimant's disability reached a permanent stage on February 19, 1942. That by reason of said injury claimant has sustained permanent partial disability consisting in loss of over 80 per cent of the sight of said eye, entitling him to compensation at \$25.00 a week for 140 weeks beginning with said February 19, 1942." (Ap. 19-20.)

“That by reason of said injury claimant has sustained, in addition to said loss of sight, serious facial and head disfigurement consisting in a large white spot across the pupil of said eye resembling a cataract and some narrowing of the aperture between the upper and lower eyelids of said eye. That just and equitable compensation therefore is \$750, which is payable forthwith.” (Ap. 20.)

The compensation order conformed to the findings and was against the employer and his insurance carrier. (Ap. 20.)

By their libel to review the order, the libelants sought to set aside that part of the order awarding the employee \$750 for serious facial and head disfigurement. (T. 9.) this, they alleged, was not in accordance with law and amounted to double compensation or recovery for the same injury, for the reason that the award of \$25 weekly for 140 weeks for loss of eyesight exhausted all compensation to which the employee was entitled under the Longshoremen's and Harbor Workers' Compensation Act. (T. 6-7.)

Exceptions to the libel were filed by the respondent deputy commissioner. (T. 21-22.) The exceptions were sustained, the libel dismissed, and a decree entered affirming the compensation order. (T. 31-32.) An opinion was rendered in the district court. (T. 22-27.) It is reported as 52 F.S. 882. Findings of fact and conclusions of law preceded the decree. (T. 27-30.)

Succinctly stated the question involved on the appeal is purely one of law involving a construction of

the provisions of the Longshoremen's and Harbor Workers' Act, sec. 8 (33 U.S.C.A. sec. 908).

**SPECIFICATION OF THE ASSIGNED ERRORS
RELIED UPON.**

Appellants rely upon their assigned errors Nos. II, IV, IVa, and V. (Ap. 38-40.)

**ARGUMENT OF THE CASE.
A. SUMMARY.**

As stated, the appeal presents only a question of law involving the construction of the Longshoremen's and Harbor Workers' Compensation Act. Through erroneous construction of the Act the deputy commissioner awarded the employee double compensation for the same injury. He awarded the employee full compensation under the Act for the loss of over 80% of the vision of an eye. Such loss, under the Act, was the same as the loss of the eye. But the deputy commissioner went further. Because of a blemish on the affected eye he awarded additional compensation to the employee in the sum of \$750 for "serious facial or head disfigurement". That part of the compensation order is not in accordance with law and should be set aside. It is not in accordance with law because, under the Act, the compensation awarded the employee for loss of vision exhausted all the compensation to which he was entitled by reason of injury to the eye, or in connection there-

with. The district court confirmed the error of the deputy commissioner. It sustained exceptions to the libel and entered a decree dismissing the libel and affirming the award. The decree should be reversed with directions to the district court to enter a decree setting aside the award of \$750.

B. POINTS OF LAW AND FACT.

1. THE COMPENSATION ORDER WAS NOT IN ACCORDANCE WITH LAW IN AWARDING THE EMPLOYEE \$750 FOR SERIOUS FACIAL AND HEAD DISFIGUREMENT, AND THE DECREE AFFIRMING THE AWARD SHOULD BE REVERSED WITH DIRECTIONS TO THE DISTRICT COURT TO SET ASIDE THE AWARD OF \$750.

(a) *Assignment of Error No. IV.* (Ap. 39.) That the said Court in affirming the compensation award of respondent Warren H. Pillsbury, dated and filed the 12th day of February, 1943, directing libelants above named to pay David M. Young, as claimant, the sum of Seven Hundred Fifty (\$750) Dollars forthwith for serious facial and head disfigurement, and the sum of Twenty-five (\$25) Dollars a week for 95 $\frac{3}{7}$ weeks, commencing December 28th, 1942.

Appellants are mindful that compensation statutes are to be liberally construed (*Travelers Insurance Co. v. Branham*, 136 F. 2d 873, 875), but they are also mindful that with reference to the Longshoremen's and Harbor Workers' Compensation Act it was said by this court in *Marshall v. Andrew F. Mahony Co.*, 56 F. 2d 74 at page 78:

“To arrive at its proper meaning and application, section 10 (33 U.S.C.A., sec. 910) must be taken in its entirety and its true meaning be ascertained by giving due weight and consideration to all parts of the section in the light of the general aims and objects of the statute taken as a whole.”

Section 8 of the said Act (33 U.S.C.A., sec. 908) lists some twenty-one different types of compensable injuries involving permanent partial disability. In pertinent part, the sections read:

“Compensation for disability shall be paid to the employee as follows: * * *

(c) Permanent partial disability: In case of disability partial in character but permanent in quality, the compensation shall be $66\frac{2}{3}$ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability, paid in accordance with subdivision (b) of this section, and shall be paid to the employee, as follows: * * *

(5) Eye lost, one hundred and forty weeks' compensation. * * *

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye. * * *

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for the loss of the member. * * *

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of

use of a member may be for proportionate loss of use of the member.

(20) Disfigurement: 'The deputy commissioner shall award proper and equitable compensation for serious facial or head disfigurement, not to exceed \$3,500.'

Turning to the findings and award of the deputy commissioner (Ap. 18-20) it will be noticed that he first found that the employee had sustained a loss "of over 80 per cent of the sight of said eye" (Ap. 19-20). Under quoted subdivision (16) of section 8 of the said Act (33 U.S.C.A., sec. 908) this was the equivalent of a finding that the employee had lost the eye and entitled the employee to the same compensation that would have been paid had the eye been removed. And such was the award. (Ap. 20.) But the deputy commissioner also found that there was a blemish on the injured eye. He found that there was a "large white spot across the pupil of said eye resembling a cataract and some narrowing of the aperture between the upper and lower eyelids of said eye". (Ap. 20.) He found that this was a "serious facial and head disfigurement" under quoted subdivision (20) of section 8 of said Act. (33 U.S.C.A., sec. 908.) He awarded the sum of \$750 for such "serious facial and head disfigurement". (Ap. 20.) If this latter award is not in accordance with law it is very obvious that it should be set aside and the decree of the district court affirming that part of the award be reversed.

Thus the question is squarely presented. Is the said Act reasonably susceptible to the construction that an

employee is entitled to additional compensation for blemish to an eye when he has been awarded the full compensation to which he was entitled had the eye been removed?

A plain reading of said section 8 (33 U.S.C.A., sec. 908) prompts a conclusion that the various subdivisions thereof are exclusive and neither cumulative nor designed to permit double recovery or compensation by an employee for compensated injury. This was the effect of the holding in *Travelers Ins. Co. v. Norton*, D.C. Pa. 1939, 30 F.S. 119. There an employee was awarded compensation equivalent to the loss of a foot. He was later awarded compensation equivalent to the loss of a leg. Upon a construction of the Act it was declared that compensation should not have exceeded the equivalent of amputation of a leg below the knee. Quoting from pages 120 and 121:

“The Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C.A., sec. 908 (c), Subsec. (18), provides, ‘Compensation for permanent total loss of use of a member shall be the same as for loss of the member.’

The sense of the section is that compensation for loss of the use of a leg is to be governed by the same rules and considerations, so far as applicable, as those which govern amputation, because ‘loss of the member’ in this connection can mean only amputation. If it does not mean that, the clause is meaningless. There are only two ways in which a man can ‘lose’ a leg—he may have all or a part of it amputated, or he may suffer an injury which makes it useless. The latter condition is aptly and properly described as the

loss 'of use of' the leg. There is no third alternative. If the 'loss of the member' in Subsec. (18) does not mean amputation, the section would have to read 'Compensation for permanent total loss of the use of a member shall be the same as for the loss of the use of the member'—a nonsensical provision.

Now, Subsec. (15) of Sec. 908(c) of the Act defines the compensation payable for two different kinds or degrees of amputation of a leg—one above the knee and the other between the knee and the ankle. The framers of the Act no doubt felt, quite reasonably, that the latter (as well as the former) might in popular language be described as the loss of a leg. As a matter of fact, it is not entirely incorrect to say that a man whose leg has been amputated between the knee and ankle has lost his leg. The purpose of Subsec. (15) seems to have been to make sure that amputation of that kind would not be compensated for as loss of a leg.

The two sections are plainly intended to be considered together. Naturally, provisions governing amputations can not be applied literally to disablements in which the disabled member remains attached; but to carry out the intent of the Act, a rule can be stated which may be applied by analogy. It is that the compensation for loss of use of a member shall be fixed, in conformity with Subsec. (15), by the point at which amputation could be made without increasing the disability."

In the present case the eye injury to the employee would have attained its maximum if the eye had been removed. It may not be supposed that such removal

would improve the appearance of an employee. On the contrary, it is not entirely incorrect to say that facial disfigurement must naturally result in some measure from the removal of an eye. But there can be no doubt that in fixing compensation for the loss or removal of an eye Congress intended to exhaust the compensation for all the conditions resulting from such removal or loss. If, therefore, the removal results in disfigurement, it is not reasonable to suppose that Congress intended by subdivision 20 of the section to also compensate the employee for that resulting disfigurement. It is more to be supposed that Congress intended said subdivision 20 to cover situations where something other than the loss or removal of a member causes disfigurement. If the eye is retained in a blemished condition and the employee is awarded compensation equivalent to the loss or removal of the eye, then it inevitably follows that he has been fully compensated for any disfigurement caused by the blemished eye. That is precisely the case before the court, and that is precisely the reason why the additional award of \$750 for the blemished condition should be set aside.

Research has not disclosed any federal decision directly in point, but pertinent and persuasive decisions of state courts are not lacking.

In *Brown v. State Workmen's Ins. Fund*, 200 Atl. 174, the Pennsylvania court reviewed an award under a statute providing compensation for loss of use of an eye, and also providing compensation "for serious and permanent disfigurement of the head or face of such

character as to produce an unsightly appearance". In setting aside an award for additional compensation for disfigurement, the court said:

"The disfigurement must be such that does not normally follow the loss of that member. If compensation, in addition to the amount allowed for the loss of a member body, is denied, it is essential to show that some other part of the body is affected as a direct result of the injury.

He was paid compensation for all liability whatever it may be emanating from or connected with the loss of the organ in accordance with Section 306 (c). The use of the eye having been lost and compensation paid therefor, the claimant cannot recover a second time because of its subsequent removal, as the permanent loss of the use of the eye is equivalent to its physical loss. That would be paying twice for what under the act is the same thing."

In *Milling Machinery etc. Co. v. Thomas*, 50 Pac. 2d 395, the Oklahoma court reviewed an award including compensation for disfigurement resulting from the loss of an eyeball. The court said:

(The award for specific injury) "provides a definite number of weeks' compensation based upon his average earnings, and an award has been made therefor, such injury, though causing disfigurement, is wholly covered by the award provided by law, and that no separate award may be made for the disfigurement which results wholly from the specific injury. * * * But where there is a disfigurement arising out of the same accident and not arising wholly from the specific injury compensation may be made for the disfigurement

and also for the specific injury. And if the disfigurement as a whole includes disfigurement as a direct result of the specific injury, that part of the disfigurement is not considered in the award for disfigurement. If in this case the same accident had caused disfigurement of any part of claimant's head, hands or face other than that caused by the loss of the eye, compensation could be awarded therefor. But no allowance could be made for that part of the disfigurement caused by or resulting from the loss of the eye."

Without quoting therefrom, the following cases may be added:

Beekman v. N. Y. Evening Journal, 15 N.Y.S. 2d 671;

Freeman v. Endicott Forging & Mfg. Co., 253 N.Y.S. 597;

Madajewsku v. Susquehanna Collieries Co. (Pa.), 4 Atl. 2d 809;

Phillips v. Cox Bros. & Co. (Pa.), 5 Atl. 2d 444;

Hansen v. Dakota Trans. Co. (S.D.), 273 N.W. 261.

(b) *Assignment of Error No. II.* (Ap. 39.)

That the said Court erred in sustaining the respondent, Warren H. Pillsbury's exceptions to libelant's libel and confirming the compensation order to respondent David M. Young, made and filed on the 12th day of February, 1943, and in denying the motion for injunction filed by libelant in said action.

This assignment of error was directed at the general action of the court, whereas the preceding assignment was directed at the specific action relative to the \$750 complained of. What has been said in discussing the preceding assignment is also applicable here.

(c) *Assignment of Error No. IVa.* (Ap. 39-40.) That the Court erred in finding and decreeing that respondent David M. Young sustained a personal injury from a foreign body entering his right eye causing an ulcer thereof and resulting in permanent disability and serious facial disfigurement within the meaning of the terms permanent disability and serious facial disfigurement, as said terms are used and defined in the Longshoremen's and Harbor Workmen's Compensation Act.

Appellants are mindful that they were not entitled to a trial *de novo* in the district court (*Merritt-Chapman & Scott Corporation v. Bassett*, D.C. Mich. 1943, 50 F.S. 488, 489), and that the findings of the district court merely adopt and confirm the findings of the deputy commissioner. It has already been pointed out that the findings and award of the deputy commissioner are not in accordance with law to the extent of the said \$750. To the same extent, therefore, the court erred in its findings and decree.

(d) *Assignment of Error No. V.* (Ap. 40.) That said Court erred in finding and decreeing that said David M. Young sustained a loss of over 80% of the sight of his right eye and in addition to said loss of sight, sustained serious facial and

head disfigurement, as said terms loss of sight and serious facial and head disfigurement are defined and used in the Longshoremen's and Harbor Workmen's Compensation Act.

This assignment is perhaps repetition, but it particularizes the error in the finding and decree of the district court. It requires no separate argument.

CONCLUSION.

For the several reasons herein stated, it is therefore respectfully submitted that the judgment herein should be reversed with directions to the district court to set aside that part of the compensation order of the deputy commissioner awarding the employee \$750 for facial and head disfigurement.

Dated, San Francisco,
July 5, 1944.

R. P. WISECARVER,
Proctor for Appellants.

No. 10,749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

L. S. CASE, doing business as L. S. Case
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VS.

WARREN H. PILLSBURY, Deputy Commis-
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District under the Longshoremen's and
Harbor Workers' Compensation Act, and
DAVID M. YOUNG,

Appellees.

**Appeal from the District Court of the United States for the
Northern District of California, Southern Division.**

BRIEF FOR APPELLEE PILLSBURY, DEPUTY COMMISSIONER.

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FILED

AUG - 3 1944

PAUL P. O'BRIEN,
CLERK



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No. 10,749

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L. S. CASE, doing business as L. S. Case
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VS.

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District under the Longshoremen's and
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DAVID M. YOUNG,

Appellees.

**Appeal from the District Court of the United States for the
Northern District of California, Southern Division.**

BRIEF FOR APPELLEE PILLSBURY, DEPUTY COMMISSIONER.

STATEMENT OF CASE.

On October 1, 1941, David M. Young, hereinafter designated as "claimant", was in the employ of L. S. Case Company as a carpenter on board the S.S. "West Portal" at Oakland, California, and while thus engaged a foreign body entered his right eye, causing an ulcer resulting in industrial blindness of the eye.

The employer and insurance carrier paid claimant compensation for temporary total disability and for the loss of vision of the eye and there is no question here regarding this phase of the matter. The deputy commissioner, however, found that claimant sustained a serious facial and head disfigurement in addition to the loss of sight. The deputy commissioner found the facts with respect to said disfigurement as follows:

“That by reason of said injury claimant has sustained, in addition to said loss of sight, serious facial and head disfigurement consisting in a large white spot across the pupil of said eye resembling a cataract and some narrowing of the aperture between the upper and lower eyelids of said eye. That just and equitable compensation therefor is \$750.00, which is payable forthwith;”

It is the award based thereon which appellants attack as being not in accordance with law. It is the appellants' contention (the only issue in the case) that the award for the loss of vision of the eye precluded an additional award for the disfigurement resulting from a large white spot across the pupil and a narrowing of the aperture between the upper and lower eyelids.

ARGUMENT.

POINT I.

WHERE THE INJURY CONSISTS OF DISFIGUREMENT AS WELL AS DISABILITY AN AWARD FOR BOTH IS PROPER.

Before proceeding to the argument of this point, the Court's attention is called to the fact that appellants did not, in the libel, challenge the finding of fact of the deputy commissioner to the effect that claimant sustained a serious facial and head disfigurement upon the ground that said finding was not supported by evidence; therefore the finding is not subject to judicial review but should be regarded as final and conclusive. Compare *South Chicago Coal & Dock Co., et al. v. Bassett, deputy Commissioner*, 309 U.S. 251 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U.S. 162 (1933); *Crowell, deputy commissioner, v. Benson*, 285 U.S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner*, 286 U.S. 528 (1932), 71 C. J. 1297, sec. 1268; *Parker, deputy commissioner, v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Marshall, deputy commissioner, v. Pletz*, 317 U.S. 383 (1943).

Appellants' contention that claimant is not entitled to an award for the disfigurement admittedly existing, because he received an award for loss of vision of the right eye, is not supported either by a proper construction of the Act nor by the weight of authority.

CONSTRUCTION OF THE ACT.

Section 8(c) of the Longshoremen's Act (33 U.S.-C.A. sec 908(c)) specifies the number of weeks' compensation to be paid for the specified losses (and losses of use) enumerated in the subdivisions 1 to 19 of said section, such as for the loss of an arm, leg, hand, etc. Subdivision 22 of that section provides in substance that if more than one member or parts of more than one member are lost, there shall be an award for each such member or part thereof which is lost. In addition to said subdivisions 1 to 19, relating to compensation for the loss (or loss of use) of a member or members, subdivision 20 of said section makes an additional provision for disfigurement as follows:

“Disfigurement: The deputy commissioner shall award proper and equitable compensation for serious facial or head disfigurement, not to exceed \$3,500.”

There is no provision in the Act limiting an award for disfigurement to those cases wherein no award is made for the loss of a member. It seems plain that subdivisions 1 to 19 provide for awards for the impairments resulting from loss of members while subdivision 20 provides separately for an award for *disfigurement*. The award for the loss of a specified member, or members, may bear some general relation (although it does not have to) to a decrease in an employee's wage earning capacity; and similarly the award for disfigurement is not necessarily to be related to a specific loss of earning capacity, although in cases it may be by chance correlation. As the United

States Supreme Court stated in *American Knife Co. v. Sweeting*, 250 U.S. 596:

“But we cannot concede that impairment of earning power is the sole ground upon which compulsory compensation to injured workmen legitimately may be based. Unquestionably it is a rational basis, and it is adopted for the generality of cases by the New York law. But the Court of Appeals has construed the 1916 amendment as permitting an allowance for facial or head disfigurement although it does not impair the claimant’s earning capacity. *Matter of Erickson v. Preuss*, 223 N.Y. 365, 368; and see opinion of Judge Cardozo in the present case, 226 N.Y. 199, 200. * * *”

* * * * *

“* * * And we see no constitutional reason why a State may not, in ascertaining the amount of such compensation in particular cases, take into consideration any substantial physical impairment attributable to the injury, whether it immediately affects earning capacity or not.”

* * * * *

“Whether an award for such disfigurement should be made in combination with or independent of the compensation allowed for the mere inability to work is a matter of detail for the State to determine.”

If an employee should sustain an injury resulting only in the loss of hearing of one ear, should he receive under the Longshoremen’s Act the same compensation as another employee who sustained an injury resulting not only in loss of hearing of one ear but the disfiguring loss of the ear itself? Similarly,

should an employee who sustains an injury resulting in a loss of vision of one eye receive the same compensation as another employee who not only sustains similar loss of vision, but in addition a disfigurement due to a white scar across the pupil of the eye and a narrowing of the aperture between the upper and lower eyelids? The common sense answer should immediately be, "No". Congress apparently intended that disfigurement awards shall be made where disfigurement exists, even though concurrently there may be impairment of the function of the affected organ or facial member.

WEIGHT OF AUTHORITY.

The weight of authority regards compensation for disfigurement as a basis for an award separate from that which is made for the loss or loss of use of the member itself or the function of the facial member, where the appearance of the member is such as to cause disfigurement. In *Tinsley v. Walgreen Drug Company*, 197 S.C. 415, 15 S.E. (2d) 667 (1942), the Court held that compensation for disfigurement of the hand, in addition to compensation for its loss of use, was proper. (N.B. Disfigurement compensation under the Longshoremen's Act does not extend to body members, but to facial and head areas.) *Murdaugh v. Robert Lee Construction Co.*, 185 S.C. 497, 194 S.E. 447 (1938), involved the same principle. *Coates v. Warren Hotel*, 18 N.J. Misc. 363, 13 Atl. (2d) 787 (1940), held that an allowance for disfigure-

ment is *in addition to* the strictly functional loss ensuing from injury and is within both the spirit and letter of the law. *Renick v. Missouri-Pacific R.R. Co.*, 95 S.W. (2d) 872 (1936) (not reported in State reports), held that compensation may be paid for disfigurement in addition to compensation for loss of the eye. *Indiana Limestone Co. v. Stockton*, 88 Ind. App. 22, 163 N.E. 27 (1928), held the same. Compare *Elkins v. Lallier*, 38 N.M. 316, 32 Pac. (2d) 759 (1934).

NEW YORK AUTHORITIES.

The decisions of the New York Courts construing the New York workmen's compensation law are of greater importance as precedents than the decisions of other jurisdictions. The Longshoremen's Act was modelled after the New York workmen's compensation law; *Marshall, deputy commissioner, v. Mahoney*, 56 F. (2d) 74 (C.C.A. 9, 1932; *Luckenbach S. S. Co. v. Marshall, deputy commissioner*, 49 F. (2d) 625 (D.C. Ore. 1931); *Bethlehem Shipbuilding Corp. v. Monahan, deputy commissioner*, 54 F. (2d) 349 (C.C.A. 1, 1931); *Webster v. Clodfelter*, 130 F. (2d) 434 (App. D.C. 1942); *Hartford Accident and Indemnity Co. v. Hoage, deputy commissioner*, 85 F. (2d) 411 (App. D.C. 1936); *Employers Liability Assurance Corporation v. Monahan, deputy commissioner*, 91 F. (2d) 130 (C.C.A. 1, 1937). See also House Report No. 1190, 69th Congress, First Session, at page 2. It is a generally recognized rule of statutory construction that the adoption of a statute of

another jurisdiction carries with it the construction which has been placed upon it prior to its adoption. *Capital Traction Co. v. Hof*, 174 U.S. 1; *Metropolitan Ry. Co. v. Moore*, 121 U.S. 558; *Bethlehem Shipbuilding Corp. v. Monahan, deputy commissioner*, 54 F. (2d) 1349 (C.C.A. 1, 1931); *West Penn Sand and Gravel Co. v. Norton, deputy commissioner*, 95 F. (2d) 498 (C.C.A. 3, 1938); *Newton v. Employers Liability Assurance Corp.*, 107 F. (2d) 164 (C.C.A. 4, 1939).

The following New York cases taken from Special Bulletin No. 161, issued by the Department of Labor, New York State, have interpreted the corresponding provision of the New York law regarding the payment of compensation for disfigurement. The quotation is from page 127 of the Bulletin and is as follows:

“The Appellate Division, unanimously and without opinion, affirmed award for disfigurement in the following * * * cases: \$450 to a chauffeur for staring appearance and retraction of a glass eye; *Ackerman v. New East 97th St. Garage*, 224 App. Div. 681; \$250 to a painter for a tic or habit spasm of his left eye as a consequence of a plaster burn on its cornea: *Berchenke v. Miller*, 223 App. Div. 803; \$500 to a carpenter for immobility and other defects of a glass eye substituted for a blind eye that has to be enucleated because of accident: *Gibbs v. Czapela*, 224 App. Div. 799; and \$1,500 to a garage worker for the appearance of his right eye’s socket following destruction of the eye by sulphuric acid and insertion of a glass eye in its place: *Partridge v. Tew Motor Sales Co.*, 222 App. Div. 787.”

Also in the case of *Lipton v. Victor X-Ray Corp.*, 36 State Dept. (N.Y.) 697, an award of \$500 for serious permanent disfigurement was made to a traveling salesman to whom an award of a lump sum had previously been awarded and paid for the entire loss of vision of his right eye.

Construing the provision of the New York law which was adopted in the Longshoremen's Act, the United States Supreme Court said in the combined cases of *New York Central R. R. Co. v. Bianc*; *American Knife Co. v. Sweeting*; *Clark Knitting Company, Inc., et al. v. Vaughn*, 250 U.S. 596 (1919) that:

“In each case an award was made on account of such disfigurement *irrespective of the allowance of compensation according to the schedule based upon the average wage of the injured employee and the character and duration of the disability.*” (Italics supplied.)

In other words, the award for disfigurement was made *in addition to the award for permanent partial disability* due to functional impairment. The United States Supreme Court held in these cases that this was proper.

APPELLANTS' AUTHORITIES.

The authorities cited by appellants in support of their contention that an award for disfigurement may not be made in addition to an award for the loss of use of the member itself either are not in point, do

not state the holding of the highest Court of their respective jurisdictions, or are based upon specific statutory provisions respecting awards for disfigurement. The two New York cases cited by appellants, namely, *Freeman* (should be *Freeland*) *v. Endicott Forging & Manufacturing Co.*, 253 N.Y.S. 597, and *Beekman v. New York Evening Journal*, 15 N.Y.S. (2d) 671, are not in point in that the former holds that an award for disfigurement may not be made concurrently with an award for loss of earning capacity (non-scheduled injury), and the latter case holds that an award for disfigurement may not be made in addition to an award for permanent total disability (also non-scheduled). In the instant case there was neither an award for loss of earning capacity nor for permanent total disability, but an award of indemnity for a specific scheduled loss as provided by section 8 (c).

The other cases cited by appellants, namely, *Brown v. State Workmen's Insurance Fund*, 131 Pa. Sup. 174, 200 Atl. 174; *Madajewski v. Susquehanna Collieries Co.*, 135 Pa. Sup. 181, 4 Atl. (2d) 809; and *Phillips v. Cox Bros. & Co.*, 135 Pa. Supp. 185, 5 Atl. (2d) 445, are all decisions of the Pennsylvania Superior Court, which is not the highest Court of Pennsylvania. "The Pennsylvania Supreme Court, which is the Court of last resort, has stated its opinion with reference to the point at issue in the case of *Sustar v. Penn Smokeless Coal Co.*, 285 Pa. 395, 132 Atl. 345 (1926), which involved the question whether compensation for disfigurement could be awarded in

addition to compensation for loss of the eye. The Court in its memorandum opinion adopted the opinion of the Court below reported in 85 Pa. Sup. 531 and stated:

“The Superior Court * * * properly decided that compensation payable under the Act of 1921 is not exclusive of all other compensation but may be awarded for disfigurement in addition to that given for loss of a body member * * *.”

Two cases cited by appellants, namely, *Milling Machinery Co. v. Thomas*, 174 Okla. 483, 50 Pac. (2d) 395 (1935); and *Hansen v. Dakota Transportation Co.*, 65 S. Dak. 277, 273 N.W. 261 (1937), appear to require special comment. It is believed that the Court should be apprised that both of these decisions are the result of specific provisions in the respective laws to the effect that compensation for disfigurement shall not be in addition to compensation for so-called scheduled losses (losses of members). In Oklahoma the law provides:

“Provided, that compensation for * * * disfigurement shall not be in addition to the other compensation provided for in this section * * *.”

In South Dakota, the law provides:

“No compensation shall be payable under this subdivision (for disfigurement) where compensation is payable under subdivisions (3), (4), and (5) of this section. (Matter in parentheses ours.)

These two cases not only do not support appellants' contention but rather appear to lend support to the view that a special provision in the law is necessary

if an injured employee is *not* to receive compensation for disfigurement because he has received compensation for a member loss. There is no such provision in the Longshoremen's Act.

Appellants have also cited *Travelers Insurance Co. v. Norton, deputy commissioner*, 30 F. Supp. 119. Why it was cited is not apparent, as the fact situation therein has not the remotest resemblance to that in the instant case. It did not involve construction of subdivision 20 of section 8 (c) (as does the instant case) but rather two other subdivisions, namely, 15 and 18 of section 8 (c), relating to an award for loss of use of the leg.

CONCLUSION.

It has been repeatedly stated that the Longshoremen's Act is a remedial statute and should be liberally construed in favor of the injured workman and his family. *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner*, 284 U.S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris*, 61 App. D.C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al., v. Cardillo, deputy commissioner*, 70 App. D.C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & Ohio R. R. Co.*, 71 F. (2d) 810 (C.C.A. 4, 1934), certiorari denied October 8, 1934, 293 U.S. 581. When Congress has provided that an employee should receive compensation for facial disfigurement it would not be a liberal construction of the Act to read into it a condition or

qualification not plainly discernible which would deprive the employee of part of his compensation. For the above reasons, it is believed that the modest award for facial disfigurement which was made in this case was proper and that the judgment of the United States District Court dismissing the libel, and thus, in effect, affirming the award, should be affirmed.

Dated, San Francisco, California,
August 2, 1944.

FRANK J. HENNESSY,
United States Attorney,

JAMES T. DAVIS,
Assistant United States Attorney,

Proctors for Appellee Pillsbury.

WARD E. BOOTE,
Chief Counsel,
United States Employees' Compensation Commission,

HERBERT P. MILLER,
Associate Counsel,
Of Counsel.



No. 10,749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

L. S. CASE, doing business as L. S. Case
Company, and TRAVELERS INSURANCE
COMPANY (a corporation),

Appellants,

VS.

WARREN H. PILLSBURY, Deputy Commis-
sioner of the Thirteenth Compensation
District under the Longshoremen's and
Harbor Workers' Compensation Act, and
DAVID M. YOUNG,

Appellees.

REPLY BRIEF FOR APPELLANTS.

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FILED

AUG 13 1944

PAUL P. O'BRIEN,
CLERK



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District under the Longshoremen's and
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DAVID M. YOUNG,

Appellees.

REPLY BRIEF FOR APPELLANTS.

FOREWORD.

This reply brief is presented under the main sub-
division heading adopted in the opening brief.

THE COMPENSATION ORDER WAS NOT IN ACCORDANCE WITH LAW IN AWARDING THE EMPLOYEE \$750 FOR SERIOUS FACIAL AND HEAD DISFIGUREMENT, AND THE DECREE AFFIRMING THE AWARD SHOULD BE REVERSED WITH DIRECTIONS TO THE DISTRICT COURT TO SET ASIDE THE AWARD OF \$750.

The appellees agree with appellants that the sole question before the court is one of construction of the Longshoremen's Act. That question was summed up at pages 7 and 8 of appellants' opening brief as follows: *Is the said Act reasonably susceptible to the construction that an employee is entitled to additional compensation for blemish to an eye when he has been awarded the full compensation to which he was entitled had the eye been removed?*

The appellees, like the appellants, have not been able to find any federal decision directly answering the question. But if the Deputy Commissioner misconstrued the Act and gave a distorted meaning to the terms thereof, the law is plain that the award should be set aside. (*Norton v. Warner Co.*, 321 U. S., 64 S.Ct. 747, 750, 751, 88 L.Ed. Adv. Op. 606.)

In their opening brief the appellants cited a number of decisions by state courts construing analogous state statutes, and supporting the position of appellants that the Longshoremen's Act was not reasonably susceptible to the construction given it by the Deputy Commissioner. They were not cited on the theory that they were binding on this court. They were cited because of the persuasive and logical reasoning they contained.

In turn, appellees counter with decisions by other state courts and assert that they sponsor and support a

contrary construction. It may be mentioned that the subject of "Compensation for Disfigurement" is extensively annotated in 80 A.L.R. 970 and 116 A.L.R. 712, and that appellees, like appellants, have drawn freely on the cases there collected. Naturally, and as the said annotations point out, the decisions by the state courts hinge on the wording of the particular statutes construed. Some decisions cited by appellees were concerned with statutes containing the term "*additional*", and thereby expressly authorizing *additional* compensation of the character under discussion. Other decisions cited by appellees were concerned with statutes which, although not using the term "*additional*", nevertheless contained language to the same effect.

The word "*additional*" is not contained in subdivision 20 of subsection (c) of section 8 of the Longshoremen's Act of 1927 (33 U.S.C.A., sec. 908) authorizing an award of compensation for "serious facial or head disfigurement". What is therefore plain is that the appellees are asking this court to do what Congress did not do and write the word "*additional*" into the said subdivision. The obvious result of the writing-in process would be to exclude from the benefits of the Act those whom it is manifest that Congress intended to benefit. If only a person entitled to compensation under some other subdivision of said subsection (c) is entitled to compensation for "serious facial or head disfigurement" under said subdivision 20, that is, "*additional*" compensation, then those whose only injury consists in "serious facial or head disfigurement" will be excluded from the benefits of the Act. A rea-

sonable construction of the Act must therefore necessarily lead to the conclusion that the various subdivisions of said subsection (c) are exclusive and neither cumulative nor designed to permit double or additional recovery or compensation by an employee for compensated injury.

This may be further demonstrated by considering other language in said subdivision (c). All the subdivisions thereof have reference to “*permanent* partial disability”. Hence any award under subdivision 20 must be confined to “serious facial or head disfigurement” of a *permanent* character. If an eye is injured to the extent that it must be removed, or if it is injured to an equivalent extent, how can any Deputy Commissioner say that a blemish to the eye is *permanent*? If it is uncertain whether the eye is to be removed, then it is equally uncertain whether disfigurement caused by a blemished condition of the eye is *permanent*. Therefore, when such uncertainties exist, no award can properly be made under said subdivision 20.

By the express terms of subsection (c) the loss of an eye, the loss of the use of an eye, the loss of 80% of the vision of an eye, are deemed the equivalent of each other and equivalently compensable, namely, by $66\frac{2}{3}$ per centum of the average weekly wages for one hundred and forty weeks. As it is obvious that such compensation is the limit of compensation for the removal of an eye, blemish or unblemished, it necessarily follows that it is also the limit of compensation for the loss of the use of an eye, blemished or unblem-

ished, or for the loss of 80% of the vision of an eye, blemished or unblemished.

The appellees point out at page 7 of their brief that the Longshoremen's Act was patterned on the Workmen's Compensation Laws of the state of New York, and assert that "the decisions of the New York Courts construing the New York workmen's compensation law are of greater importance as precedents than the decisions of other jurisdictions".

The correct rules were stated by this court in *Twin Harbor Stevedoring & Tug Co. v. Marshall*, 103 F. 2d 513, as follows, at page 516:

"The provisions of sec. 8 (c) and (e) of the Longshoremen's Act were taken from sec. 15 of the Workmen's Compensation Laws of the state of New York, Consol. Laws, c. 67. *Candado Stevedoring Corp. v. Locke*, 63 F. 2d 902. It is claimed that at the time of the enactment of the Longshoremen's Act these provisions of the New York statute had a known and settled construction to the effect that an employee is entitled to no award of compensation where he has suffered no decrease of wages because of an injury, a construction Congress must be deemed to have adopted. (Cases cited.) A number of New York cases are cited which are said to support this rule. Four of them were decided prior to the passage of the federal act on March 4, 1927. * * * The only New York case prior to 1927 which in any way tends to support the position of appellants is *Pottle v. William H. Atkinson Co.*, 1925, 215 App. Div. 739, 212 N.Y.S. 902, in which the Supreme Court of New York, Appellate Division, rendered a memorandum decision reversing and remitting an award

‘on the ground that the award is made for a period during part of which claimant was employed, and for which he received his regular pay. That case, sketchy and truncated as the decision is, cannot fairly be said to have established a known and settled construction of the character contended for. And compare *Candado Stevedoring Corp. v. Locke*, supra.

Conceding that the later New York decisions have laid down such rule, they are inapposite for the purpose of determining historically the Congressional intent.’

At page 8 of their brief the appellees quote from a special bulletin of the New York Department of Labor, wherein 5 cases on the subject of disfigurement are cited. They are all memorandum opinions of the character termed “sketchy and truncated” by this court in the *Twin Harbor Case*. They are legally inapposite because they reflect decisions subsequent to the enactment of the Longshoremen’s Act on March 4, 1927. They are factually inapposite because none of them involved compensation for a condition caused by blemish to an eye. In *Ackerman v. New East 97th St. Garage*, 224 App. Div. 681, the award was for a staring appearance and retraction about a glass eye. In *Berchenke v. Miller*, 223 App. Div. 681, the award was for a tick or spasm of an eye. In *Gibbs v. Czapela*, 224 App. Div. 799, the award was for immobility and other defects of a glass eye substituted for an eye that had been removed. In *Partridge v. Tew Motor Sales Co.*, 222 App. Div. 787, the award was for burns to the tissues of the face caused by sulphuric acid. And in

Lipton v. Victor X-ray Corp., 36 State Dept. 697, the opinion is so vague that all that can be determined is that an award was made for some sort of serious *permanent* facial disfigurement.

In addition to quoting from the said special bulletin, the appellees (pp. 5, 9) cite *American Knife Co. v. Sweeting*, 250 U.S. 596. The case is not helpful. All that it holds is that the provision of the New York Workmen's Compensation Laws authorizing compensation for serious *permanent* facial or head disfigurement, is constitutional. Here the sole question is one of construction.

The New York law on the subject of disfigurement *prior* to the enactment of the Longshoremen's Act on March 4, 1927, is presented in 80 A.L.R. 970, where it was said, at pages 970 and 975:

(970) "It has been held that an allowance for serious facial or head disfigurement, so far as such disfigurement has no relation to disability, is an anomaly. (*Sweeting v. American Knife Co.* (1919) 226 N.Y. 199, 123 N.E. 82.)"

(975) "In *Erickson v. Preuss* (1918) 223 N.Y. 365, 119 N.E. 555, 16 N.C.C.A. 481, the view was expressed that concurrent awards might be made, one for serious facial or head disfigurement (under the 1916 Amendment) and one for disability or loss of earning power, an award for facial disfigurement before any determination as to loss of earning power being upheld in that case, and it being said that it should clearly appear, as it did, that the disfigurement award did not include anything for diminished earning power.

It was stated in *New York C.R. Co. v. Bianc* (1919) 250 U.S. 596, 63 L.Ed. 1161, 40 S.Ct. 44, 19 N.C.C.A. 633, that there was no specific finding of impairment of earning power in either that (Erickson) case or the cases reviewed in the Supreme Court.

The Erickson Case (1918) 223 N.Y. 365, 119 N.E. 555, 16 N.C.C.A. 481, was regarded in *Clark v. Hayes* (1924) 207 App. Div. 560, 202 N.Y.S. 453 (affirmed, without opinion, in (1924) 238 N.Y. 553, 144 N.E. 888), as no longer binding in view of the decision in *Sweeting v. American Knife Co.* (1919) 226 N.Y. 199, 123 N.E. 82 (affirmed in *New York C.R. Co. v. Bianc* (1919) 250 U.S. 596, 63 L.Ed. 1161, 40 S.Ct. 44, 19 N.C.C.A. 633), in which it was said there were four judges out of seven who were of the opinion that an award for disfigurement was related to loss of earning capacity. And it was held in the Hayes Case that an award for disfigurement could not be made in addition to one for permanent total disability, but only in case of permanent partial disability. It was said: 'Subdivision 3 of section 15 relates to permanent partial disability. Paragraph "t" of this subdivision is the statutory authority which permits the board to award compensation for facial or head disfigurement . . . Had the legislature intended that this particular item of permanent partial disability could be made the subject of an additional award in a case of permanent total disability it could very readily have evidenced such an intention. It appears to have evidenced the contrary.'

In the absence of evidence that a disfigurement was serious and permanent, an award was re-

versed in *Chambers v. Roulston* (1925) 214 App. Div. 825, 210 N.Y.S. 638."

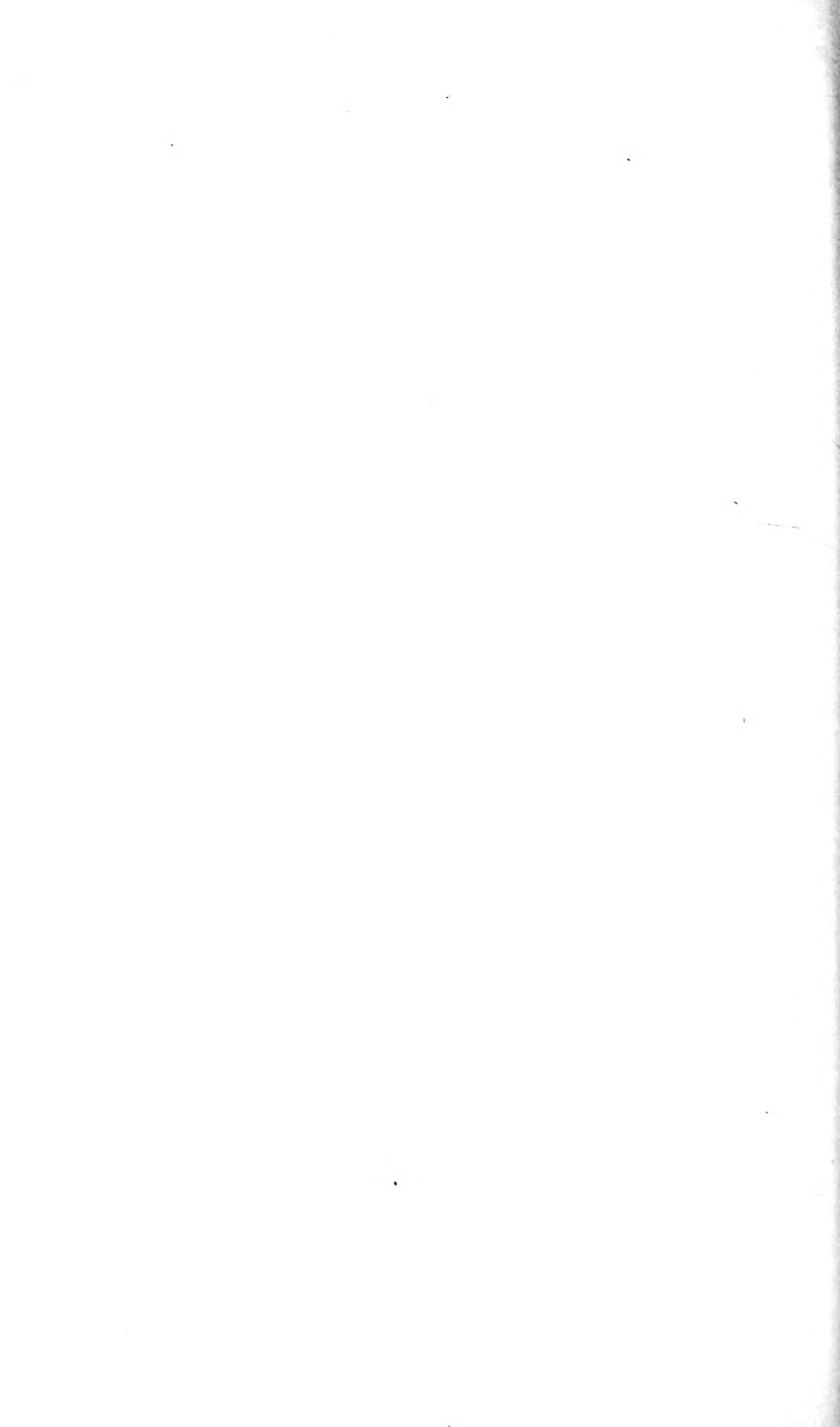
It is therefore apparent that the pertinent New York law is squarely opposed to double compensation and squarely opposed to any award for facial or head disfigurement where uncertainty exists as to the condition being *permanent*. Otherwise stated, the pertinent New York law supports the position of appellants as to the construction which should be given the Longshoremen's Act.

CONCLUSION.

For the several reasons appearing in the opening brief and herein supplemented, it is therefore again respectfully submitted that the judgment herein should be reversed with directions to the district court to set aside that part of the compensation order of the deputy commissioner awarding the employee \$750 for facial and head disfigurement.

Dated, San Francisco,
August 14, 1944.

R. P. WISECARVER,
Proctor for Appellants.



No. 10747

United States
Circuit Court of Appeals
For the Ninth Circuit.

ORVEY RAY TURNBEAUGH and DEVEINE
FLOY TURNBEAUGH,

Appellants,

vs.

MARY A. SANTOS,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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District Court of the United States
For the Northern District of California
Northern Division

No. 10150 in Bankruptcy

In the Matter of

ORVEY RAY TURNBEAUGH,

Bankrupt.

ORDER OF ADJUDICATION AND
REFERENCE, ETC.

At Sacramento, in said District, on the 8th day of August, 1942.

The Petition of Orvey Ray Turnbeaugh filed on the 7th day of August, 1942, that Orvey Ray Turnbeaugh be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered; and no opposition being made thereto

It Is Adjudged that the said Orvey Ray Turnbeaugh is a bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it hereby is referred to Stephen N. Blewett, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required and permitted by said Act, and that the said Orvey Ray Turnbeaugh shall henceforth attend before the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in the Ripon "Record", a newspaper published in the County of San Joaquin, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated August 8, 1942.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed August 8, 1942. Walter B. Maling, Clerk. [1*]

District Court of the United States
For the Northern District of California
Northern Division

No. 10151 in Bankruptcy

In the Matter of

DEVEINE FLOY TURNBEAUGH,
Bankrupt.

ORDER OF ADJUDICATION AND
REFERENCE, ETC.

At Sacramento, in said District, on the 8th day of August, 1942.

The Petition of Deveine Floy Turnbeaugh filed on

*Page numbering appearing at foot of page of original certified Transcript of Record.

the 7th day of August, 1942, that Deveine Floy Turnbeaugh be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered; and no opposition being made thereto

It Is Adjudged that the said Deveine Floy Turnbeaugh is a bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it hereby is referred to Stephen N. Blewett, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required and permitted by said Act, and that the said Deveine Floy Turnbeaugh shall henceforth attend before the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in the Ripon "Record", a newspaper published in the County of San Joaquin, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated August 8, 1942.

A. F. ST. SURE,

District Judge.

[Endorsed]: Filed Aug. 8, 1942. Walter B. Maling, Clerk. [2]

In the District Court of the United States, in and for the Northern District of California, Northern Division.

No. 10151

In Bankruptcy

In the Matter of

DEVEINE FLOY TURNBEAUGH,

Bankrupt.

WRITTEN OBJECTION TO TRUSTEE'S REPORT OF EXEMPT PROPERTY AND REQUEST FOR HEARING

To Hon. Stephen N. Blewett, Referee in Bankruptcy and to Orvey Ray Turnbeaugh, *Orvey Ray* Turneabugh, and John J. O'Reilley, Esquire, Their Attorney:

You, and each of you, will please take notice that Mary A. Santos hereby files her written objection to the Trustee's Report of Exempt Property herein on the ground that the real property therein set forth is not exempt from execution under the laws of the State of California because that while a Declaration of Homestead was recorded, at the time of such recordation of Homestead, neither Deveine Floy Turnbeaugh or Orvey Ray Turnbeaugh, or either of them, was actually residing upon the real property therein described or described in said Trustee's Report.

Wherefore, said Mary A. Santos respectfully requests a hearing before the Referee herein to deter-

mine whether said real property described in said Trustee's Report is exempt as a homestead, and the Referee is hereby requested to fix a time and place for said hearing convenient for the Court, counsel for the Bankrupt, and counsel for said Mary A. Santos.

Dated October 17, 1942.

GUMPERT & MAZZERA,

Attorneys for said Mary A.
Santos. [3]

State of California,

County of San Joaquin—ss.

J. Calvert Snyder, being first duly sworn, deposes and says:

That he is an attorney at law associated with the law firm of Gumpert & Mazzera, attorneys for Mary A. Santos in the above-entitled matter; that as such attorney, he is familiar with the facts involved in the above matter, and that all of such facts are within his own knowledge; that he has read the foregoing Written Objection to Trustee's Report of Exempt Property and Request for Hearing and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information and belief and as to those matters, he believes it to be true.

J. CALVERT SNYDER

Subscribed and sworn to before me this 17th day of October, 1942.

[Seal] E. A. SANGUINETTI,
Notary Public in and for the County of San Joaquin, State of California.

[Endorsed]: Filed Oct. 19, 1942. Stephen N. Blewett, Referee in Bankruptcy. [4]

In the District Court of the United States, in and for the Northern District of California, Northern Division.

No. 10150 In Bankruptcy.

In the matter of

ORVEY RAY TURNBEAUGH,

Bankrupt.

TRUSTEE'S REPORT OF EXEMPT
PROPERTY

To the Honorable Stephen N. Blewett, Referee in Bankruptcy:

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him in his schedules filed in the above entitled proceeding.

Description	Estimated Value
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All that real property in the County of San Joaquin, State of California, described as follows, to wit:

A portion of the East 30 acres of the Southeast Quarter of the Southwest Quarter of Section 20, Township 2 South, Range 8 East, Mount Diablo Base and Meridian, and more particularly described as follows, to wit:

Commencing at the Southeast corner of the Southwest Quarter of said Section 20; thence North $89^{\circ} 13\frac{1}{2}'$ West 60 feet to the West bank of Irrigation Canal and the point of beginning of the herein described parcel of land; thence North $89^{\circ} 13\frac{1}{2}'$ West, 174.9 feet to a point; thence North $0^{\circ} 10\frac{1}{2}'$ East to the center of an irrigation ditch; thence along center of irrigation ditch south $89^{\circ} 13\frac{1}{2}'$ East, 182.45 feet to the west bank of irrigation canal; thence South $1^{\circ} 49'$ West along west bank of said canal 263.25 feet to the point of beginning, containing 1.08 acres \$5,000.00

Subject to irrigation ditch along the north line and county road along the south line thereto.

Acreage computed to include portion in road on South and irrigation ditch on north.

Description	Estimated Value
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The foregoing property is encumbered by a deed of trust in favor of the State Building & Loan Association of Stockton, California, the approximate amount of \$2,430.00. Declaration of Homestead was filed in the Office of the County Recorder of San Joaquin County on the 20th day of November, 1940, recorded in Book of Official Records, Vol. 719, page 16, San Joaquin County Records.

Necessary household furniture	100.00
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(Exempt under Sec. 690 C.C.P. (State of California))

Dated: Oct. 15, 1942

LLOYD W. BUCHENAU,
Trustee.

[Endorsed]: Filed Oct. 15, 1942. Stephen N. Blewett, Referee in Bankruptcy. [5]

In the District Court of the United States, in and
for the Northern District of California, North-
ern Division

In Bankruptcy

No. 10150

In the Matter of

ORVEY RAY TURNBEAUGH,

Bankrupt.

And

In Bankruptcy

No. 10151

In the Matter of

DEVEINE FLOY TURNBEAUGH,

Bankrupt.

**OPINION OF REFEREE UPON QUESTION
OF EXCEPTION TO TRUSTEE'S RE-
PORT OF EXEMPT PROPERTY**

The above entitled matters were duly consolidated for the purpose of the hearing and determination of the claims of bankrupts to an homestead exemption.

Orvey Ray Turnbeaugh, a painter by occupation, and Deveine Floy Turnbeaugh, his wife, filed their petitions and schedules in bankruptcy herein on the 8th day of August, 1942 and were duly adjudicated, and the matters were referred to the undersigned Referee. In their schedules (B 5), the respective bankrupts claimed as exempt certain real property

and buildings [6] thereon, situated near Manteca, San Joaquin County, California of the stated value of \$5,000.00, under the California Homestead laws by reason of a Declaration of Homestead executed by Floy Turnbeaugh, his wife, on November 15th, 1940 and recorded on November 20, 1940 in Book of Official Records, Vol. 719, Page 16, San Joaquin County Records.

After due and regular proceedings, Lloyd W. Buchenau was appointed as Trustee of the respective matters and he duly qualified as such. On October 15, 1942 he filed his report of exempt property, allowing therein the real property claimed as a homestead.

On October 19, 1942 Mary A. Santos, a creditor, filed her exceptions to the report and requested a hearing thereon.

A hearing was duly set and regularly noticed for December 15, 1942 before the Referee at his Courtroom at Stockton, California. At said hearing, the objecting creditor was represented by Messrs. Gumpert & Mazzer, Esqs., and the Trustee by Nat Brown, Esq., and the bankrupts by John J. O'Reilly, Esq.

The sole question before the Court is one of fact.

Were the bankrupts actually residing upon the premises at the time of the declaration of the homestead, November 15, 1940?

The premises herein referred to are described as follows:

All that real property in the County of San

Joaquin, State of California, described as follows, to-wit:

A portion of the East 30 acres of the Southeast Quarter of the Southwest Quarter of Section 20, Township Two (2) South, Range Eight (8) East, Mount Diablo Base and Meridian, and more particularly described as follows, to-wit:

Commencing at the Southeast corner of the Southwest Quarter of said Section Twenty (20); thence North $89^{\circ} 13\frac{1}{2}'$ West 60 feet to the West bank of Irrigation Canal and the point of beginning of the herein described parcel of land; thence [7] North $89^{\circ} 13\frac{1}{2}'$ West, 174.9 feet to a point; thence North $0^{\circ} 10\frac{1}{2}'$ East to the center of an Irrigation Ditch; thence along center of Irrigation ditch South $89^{\circ} 13\frac{1}{2}'$ East, 182.45 feet to the West bank of Irrigation Canal; thence South $1^{\circ} 49'$ West along West bank of said canal 263.25 feet to the point of beginning, containing 1.08 acres.

Subject to Irrigation ditch along the North line and County Road along the South line thereof.

Acreage computed to include portion in road on South and Irrigation ditch on North.

The homestead is claimed under Division 2, Part 4, Title 5 of the Civil Code of the State of California.

At the time of the declaration of homestead, the premises consisted of land on which bankrupts had hastily erected an ordinary family car garage with

a large door at one end. There were no installations, such as water, lighting or sanitary facilities. At the same time, the bankrupts were renting a comfortably furnished house about a mile and a quarter away, where their family of four children lived and where the bankrupts cooked and ate their meals and did their washing and the entertaining of their friends.

The Court would like to reiterate certain observations concerning the law of homesteads made in a recent case before the undersigned involving a similar question:

“The statutes, relating to homestead, are of an humanitarian character and, of course, should be liberally construed to effect their purpose and in the spirit in which they were received. However, there are certain fundamental statutory requirements, which must exist to entitle the bankrupt to his homestead exemption. One of these, and the only one necessary for us to consider at this time, is the question of residence. It is generally conceded by counsel that this is one of strict [8] construction.

“In *Tromans v. Mahlman*, 92 Cal. 108, (27 Pac. 1094) the court said:

‘To effect its purpose, the statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. This the court has many times used and, emphasized the word “actually” to show that the

residence must be real and not sham or pretended' ”.

Lakas Archambault,

38 Cal. App. p. 371-2.

“Concerning such evidence of intention, this court said in *Tromans v. Mahlman*, 111 Cal. 648 (44 Pac. 327), ‘whether she (the appellant) did tute a valid homestead the claimant must actually reside on t he premises when the declarafact to be determined by the court from the evidence before it’

“In the former appeal in that action *Tromans v. Mahlman*, 92 Cal. 1 (27 Pac. 1094; 28 Pac. 579) it was said:

‘It is settled law in this state that to constitute a valid homestead the claimant must actually reside on the premises when the declaration is filed (citing cases . . . The obvious purpose of the statute in providing for the selection of a homestead was to thereby make a home for the family, which neither of the spouses could encumber or dispose of without the consent of the other, and which should at all times be protected against creditors. To effect its purpose, the statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed.’ The foregoing statement of the law was approved in *Bullis v. Stanford*, 178 Cal. 40 (171 Pac. 1064). (See, also, 13 Cal. Jur. 554, and cases cited.)’ ”

Johnston v. DeBock, 198 Cal. at page 1181.

“It is settled law in this state that to constitute a valid homestead the claimant must actually reside on the premises when the declaration is filed. (Prescott v. Prescott, 45 Cal. 58; Babcock v. Gibbs, 52 Cal. 629; Aucker v. McCoy, 56 Cal. 524; Pfister v. Dascey, 68 Cal. 572; Lubbock v. McMann, 82 Cal. 228, (16 Am. St. Rep. 108).) . . .

Bullis v. Stanford

178 Cal. at p. 45 [9]

Turnbeaugh, the bankrupt, testified that there were no buildings when he purchased the property; the first lumber was delivered October 31, 1940; the garage was built in less than two weeks; size 22x24. There were no water or sanitary facilities, when the homestead was declared. That on November 14th, furniture consisting of a bed and some other items were moved into the garage. They used a coal-oil lamp for lighting purposes; an oil heater for warmth; carried their drinking water in a gallon jar to the garage from a distance from November to February. That during all of this time and up to February 9, 1941, they were renting a home from a man named Gagas, situated about one mile and a quarter distant. Orvey Ray Turnbeaugh, the bankrupt; also claims that he and his wife slept at the garage during this time from November 14th on. He said that they ate breakfast and dinner at the Gagas place, which was comfortably furnished and serviced with running water, heating and sanitary facilities and electricity. Here, their two sons and

two minor daughters lived and slept until a house was built on the homestead property. Turnbeaugh said he ate his noon meal on the homestead property whenever he was working there. Most of the family foodstuffs were kept at the Gagas house.

The bankrupt's wife corroborated the bankrupt on most of the above related testimony. She said that her husband was principally engaged as a contracting painter during this period; also that all usual household activities, such as washing, bathing, cooking, etc. were carried on at the Gagas premises.

Other witnesses called were:

W. C. Alley of the Pacific Gas & Electric Company, who testified that the lighting meter was installed February, 1941.

Sam Van Dyken, who installed the pressure water system January 28, 1941 and hand pump January 21, 1941. [10]

One Baumgardner, who drilled the well December 27, 1940-January 1, 1941 said Turnbeaugh was not there when he moved on the job. He contacted bankrupt at the Gagas residence. That he saw no evidence of anyone sleeping there at the time. That Turnbeaugh was doing some carpenter work on homestead premises when he saw him there later.

Florence McGurk, a witness for bankrupt, a close friend, visited them at garage and saw a bedroom-set there. She said that she saw the "little girls" in bed there sick with the flu in the latter part of January, 1941. No one else

testified to the girls being there in bed sick with the flu.

It seems incredible that parents in the dead of winter (and a severe one at that) would keep their sick little children in an unheated garage, when they had a warm comfortable home available.

Mrs. Therman, a witness for bankrupts, was a neighbor who lived about a block and a half away. She naturally was interested in her new neighbors. She saw the garage go up during the latter part of November. She saw lights and a car in the garage. She watched them build their house later into which they moved in May, 1941.

Another witness for bankrupts was Clem M. Mulholland who had visited them at the Gagas house and the garage several times. He said that he went to the garage one night to call them to the telephone and found the place dark, but they were in the building. He fixed the time as a week before Thanksgiving, 1940.

While the evidence is vague and conflicting as to whether the bankrupts actually slept in the garage prior to and at the time of the declaration of the homestead, even assuming they "went through the motions of a residence", there was no bona-fide actual residence then. It was purely a gesture of attempted compliance with the statute and it was but of a sham and fictitious character. It lacked an honest, genuine present intent to actually reside thereon at the time of the declaration. A future in-

tent of residence is insufficient. Claimants could not have two places of residence at the same time. Their actual residence at the time of the homestead declaration was at the Gagas home, where they continued to reside up to February, 1941. Practically all of the activities of their home life were carried on at the Gagas home. There, their family lived; there, the two [11] little girls, who, of course, needed and received a mother's care and attention lived; there, the normal affairs of the family life occurred; the meals were served; the sewing was done; the washing, bathing, etc., (all necessary to a normal respectable and sane mode of living) took place. The claim of bankrupts is fantastic. Is it credible that throughout a cold dreary wet winter, with chilling winds and driving rains and frost, that claimants lived in a garage without any ordinary facilities of living when they had a warm, comfortable, well furnished home, with a family of young children, a mile and a quarter away? Can you imagine refined people like these dressing and undressing on a cold concrete floor in the dampness of winter nights; no water, hot or cold for bathing; no toilet, not even a privy on the place; no place to keep their clothes free from dust; no cooking facilities sufficient to make a cup of hot tea and these people beyond middle age?

The Court is convinced that the bankrupts did not actually reside on the premises herein involved on November 15, 1940, and that any semblance of residence thereon at the time of the declaration was not real, but sham and pretended and not bona-

fide and genuine. Inasmuch as the homestead statutes require actual residence at the time of the declaration of the homestead, it must follow that said Homestead is invalid and of no force and effect whatever, and that the report of the Trustee, setting apart the premises claimed as a homestead, must be overruled and that the exceptions to the report of the Trustee, as filed by the creditor, must be sustained.

It Is Therefore So Ordered.

Dated: April 15, 1943.

STEPHEN N. BLEWETT,

Referee in Bankruptcy.

[Endorsed]: Filed April 15, 1943. Stephen N. Blewett, Referee in Bankruptcy. [12]

[Title of Court and Causes.]

ORDER

In the above entitled matters (which were duly consolidated for the purpose of the hearing and determination of the claims of bankrupts to a home and exemption) it appears that said bankrupts, and each and both of them, claimed a homestead, under the homestead laws of the State of California, and said bankrupts claimed and sought to have set aside to them, as and for homestead purposes, the following described real property, situate in the County of San Joaquin, State of California, to-wit:

“A portion of the East 30 acres of the Southeast Quarter of the Southwest Quarter of Sec-

tion 20, Township 2 South, Range 8 East, Mount Diablo Base and Meridian, and more particularly described as follows, to-wit: [13] Commencing at the Southeast corner of the Southwest Quarter of said Section 20; thence North $89^{\circ} 13\frac{1}{2}'$ West 60 feet to the West bank of Irrigation Canal and the point of beginning of the herein described parcel of land; thence North $89^{\circ} 13\frac{1}{2}'$ West, 174.9 feet to a point; thence North $0^{\circ} 10\frac{1}{2}'$ East to the center of an irrigation ditch; thence along center of irrigation ditch South $89^{\circ} 13\frac{1}{2}'$ East, 182.45 feet to the west bank of Irrigation Canal; thence South $1^{\circ} 49'$ West along west bank of said canal 263.25 feet to the point of beginning, containing 1.08 acres.

Subject to irrigation ditch along the north line and county road along the south line thereof.

Acreage computed to include portion in road on south and irrigation ditch on north."

And it appearing that thereafter Lloyd W. Buchenau, Esq., the duly appointed, qualified and acting Trustee in and of said bankrupts' estates made his report setting apart unto said bankrupts the foregoing described real property, pursuant to the claims of said bankrupts thereto, as a homestead.

And it appearing that thereafter and within the time provided by law therefor one of the unsecured creditors of said estate filed objections to said Trustee's Report of Exempt Property wherein said

Trustee sought to have withheld from the creditors of these bankrupt estates the said foregoing described real property; and that thereafter and within the time provided by law therefor, a hearing was had on said Trustee's Report of Exempt Property and on the Objections of the said creditor of said bankrupts to said Report and at said hearing witnesses were sworn and examined for said bankrupts and as well for said objecting creditor and said Trustee; and that thereafter written briefs on the part of said bankrupts and said objecting creditor and Trustee were duly and regularly filed herein;

After fully considering the respective positions of said bankrupts and of the said objecting creditor and Trustee, and the Court being fully advised in the premises, and good [14] cause therefor appearing, on motion of Gumpert & Mazzer, Esqs., attorneys for said objecting creditor, and Nat Brown, Esq., attorney for said Trustee, it is hereby

Ordered that said bankrupts, and neither of them, are entitled to said real property as and for a homestead, but that on the contrary said real property is not and never was a homestead, but rather an asset of said bankrupts which is to be sold in the due administration of this estate and the recoveries therefrom applied to the payment of the claims of the general creditors herein, and it is hereby further

Ordered that the said Trustee's Report of Exempt Property be amended accordingly.

Dated: April 21, 1943.

STEPHEN N. BLEWETT

Referee in Bankruptcy.

Attest: A True Copy.

STEPHEN N. BLEWETT,

Referee in Bankruptcy.

[Endorsed]: Filed April 21, 1943. Stephen N. Blewett, Referee in Bankruptcy. [15]

[Title of Court and Causes.]

PETITION FOR REVIEW OF THE ORDER
OF THE REFEREE

To Stephen N. Blewett, Esq., Referee in Bankruptcy:

Comes now your petitioners and respectfully show the following facts:

I.

That your petitioners are the above-named bankrupts.

II.

That on the 21st day of April, 1943, an order, a copy of which is hereto annexed, was made and entered herein, a copy of which order was sent through the United States Mail on the 23rd [16] day of April, 1943, to the bankrupts herein, in care of John J. O'Reilly, their attorney, ordering and holding that the claim of Homestead sought as

exempt property by the bankrupts herein, to be invalid and of no force and effect whatever, and that the report of the Trustee, setting apart the premises claimed as such homestead, must be overruled and the exceptions to the report of the Trustee, as filed by the creditor, must be sustained.

III.

That such order was and is erroneous in holding that the bankrupts did not actually reside on the homesteaded premises November 15, 1940, in that, there was testimony absolute in character that the said bankrupts did reside on said premises beginning with the 14th day of November, 1940, thereby claiming it as and occupying same as their home, and continuing to do so uninterrupted to the date of filing their petitions herein in bankruptcy.

IV.

That such order was and is erroneous in holding that bankrupts did not actually reside on said homesteaded premises on said date of November 15, 1940, in that, the question before the Referee was: Did the bankrupts actually reside on said premises on or prior to November 20, 1940, when said declaration of homestead was actually filed for record in the Office of the County Recorder of San Joaquin County, California, so far as the Statutes and decisions pertaining to homesteads are concerned: *Pfister vs. Dasey*, 68 Cal. 572-3, "actual residence before filing declaration is sufficient". 1263-1265 Civil Code of California.

V.

That such order was and is erroneous in holding that: "The claim of bankrupts is fantastic", for the reason as it states, that certain members of the bankrupts family lived elsewhere and that the bankrupts ate their meals, (not all) elsewhere, other [17] than on said homesteaded premises. That, as a matter of law and particularly in view of the decision in *Skinner vs. Hall*, 69 Cal. 195-8: "One may actually reside in a house though his family be away and he take his meals elsewhere".

VI.

That said order was and is erroneous in that it is contrary to the facts and evidence produced in behalf of the bankrupts at said hearing.

VII.

That said order was and is erroneous in holding "the evidence vague and conflicting", when as a matter of fact there was testimony without conflict and uncontradicted, that bankrupts moved into their garage-home with their bed and bedding, and other household facilities on November 14, 1940, and continued to and did sleep in said premises continuously thereafter. As was said in *Taylor vs. Hargous*, 4 Cal. 268, "Occupancy by family is presumptive evidence of appropriation of a place as a homestead, and is consequently notice to all the world". And also in *Mahoney vs. Hefer*, 75 Cal. 422-4, "Use to which property is put, and not its quantity, furnishes test to determine whether it is subject to homestead".

VIII.

That such order was and is erroneous in that:

(a) That such order is not supported by the evidence:

(b) That the order pursuant thereto is contrary to law;

(c) That the Court erred in admitting testimony over the objections of the Bankrupts; and

(d) That such order was and is erroneous in that no testimony upon which to base said order or to establish facts sufficient in denying said bankrupts claim of exemption to said homesteaded premises. [18]

Wherefore, your petitioners, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the Bankruptcy Law of 1898 and General Order XXVII.

Dated: April 23, 1943.

ORVEY RAY TURNBEAUGH
DEVEINE FLOY TURNBEAUGH
JOHN J. O'REILLY,

Attorney for Petitioners.

State of California,
County of San Joaquin—ss.

Orvey Ray Turnbeaugh and Deveine Floy Turnbeaugh, each for himself being first duly sworn, deposes and says:

That they are the bankrupts and petitioners herein, and that they hereby solemnly swear that the statements of facts therein contained are true ac-

according to the best of their knowledge, information and belief.

ORVEY RAY TURNBEAUGH
DEVEINE FLOY TURNBEAUGH

Subscribed and sworn to before me this 23 day of April, 1943.

[Notary Seal] JOHN J. O'REILLY
Notary Public in and for said County and State.

[Endorsed]: Filed Apr. 30, 1943, Stephen N. Blewett, Referee in Bankruptcy. [19]

[Title of District Court and Causes.]

CERTIFICATE AND REPORT OF REFEREE
ON PETITION TO REVIEW REFEREE'S
ORDER

To the Honorable District Judge of the United States District Court Presiding at Sacramento—

I, Stephen N. Blewett, Referee in Bankruptcy of this Court to whom was referred the above entitled proceedings, respectfully certify and report:

That on October 15, 1942, the Trustee of the above entitled bankrupt estates (which were by Order consolidated and treated as one for the purposes of administration only) filed his Report of Exempt Property herein by which he, the said Trustee, set apart to be retained by the bankrupts as their own property under Section 1240 C.C. of the State of California, certain [20] real property

in the County of San Joaquin, State of California, specifically described as follows, to-wit:

“All that real property in the County of San Joaquin, State of California, described as follows, to wit:

A portion of the East 30 acres of the Southeast Quarter of the Southwest Quarter of Section 20, Township 2 South, Range 8 East, Mount Diablo Base and Meridian, and more particularly described as follows, to wit:

Commencing at the Southeast corner of the Southwest Quarter of said Section 20; thence North $89^{\circ} 13\frac{1}{2}'$ West 60 feet to the West bank of Irrigation Canal and the point of beginning of the herein described parcel of land; thence North $89^{\circ} 13\frac{1}{2}'$ West 174.9 feet to a point; thence North $0^{\circ} 10\frac{1}{2}'$ East to the center of an irrigation ditch; thence along center of irrigation ditch south $89^{\circ} 13\frac{1}{2}'$ East, 182.45 feet to the west bank of irrigation canal; thence South $1^{\circ} 49'$ West along west bank of said canal 263.25 feet to the point of beginning. containing 1.08 acres.

Subject to irrigation ditch along the north line and county road along the south line thereto. Acreage computed to include portion in road on south and irrigation ditch on north.”

That said real property was claimed by the said bankrupts in their schedules in bankruptcy on file herein on Schedule B-5 in each case, which said claim, being made by virtue of a Declaration of

Homestead which was purported to have been recorded as specified in the said schedules of each bankrupt.

Thereafter, and within the time provided by law therefor, written Objections to the Trustee's said Report of Exempt Property were filed herein by one Mary A. Santos, a creditor having a substantial claim herein and said Objections were directed particularly to the Trustee's Report setting aside the said real property for and because of the matters and things in said Objections to Trustee's Report contained and which in particular claim that at the time of the recordation of said Declaration of Homestead, that neither of the above entitled bankrupts were actually residing upon the real property in said Declaration of Homestead or in said Trustee's Report of Exempt [21] Property described.

That the Trustee of the above entitled bankrupt estates objected to the setting apart unto said bankrupts of said real property for and upon the same grounds and for the same reasons as contained in the Objections, which were filed by the said creditor, Mary A. Santos.

Thereafter, and within the time provided by law, and in the due administration of said estates, a hearing was had before this Referee, at which hearing the said bankrupts and each of them personally testified, together with witnesses on behalf of the said bankrupts and witnesses for and on behalf of said objecting creditor, and the said Trustee. That all parties in interest during said hearing were

represented by counsel and at all times have been represented by counsel herein.

That after the conclusion of said hearing, and at the request of counsel for the respective parties in interest, written Briefs were filed for and on behalf of the said objecting creditor and Trustee, and for and on behalf of the said bankrupts.

That, thereafter, the matter in controversy was submitted for decision to your Referee and that your Referee, after reviewing the facts and pertinent law, made the following Order on April 21, 1943:

“Ordered: That said bankrupts and neither of them are entitled to said real property as and for a homestead, but that on the contrary said real property is not and never was a homestead but rather an asset of said bankrupts and is to be sold in the due administration of these estates and the recoveries therefrom applied to the payment of the claims of the general creditors herein, and it is hereby further Ordered that said Trustee’s Report of Exempt Property be amended accordingly”.

That, thereafter, the bankrupts filed with the Referee within the time provided by law their petition for a review of [22] the aforesaid Order of said Referee. The questions presented by the review are:

Was the order of the Referee supported by sufficient evidence?

Was the order in accordance with law?

The following is a brief synopsis of the testimony of the witnesses:

Orvey Ray Turnbeaugh, one of the bankrupts, testified that the property described in the declaration of homestead was purchased during the month of August, 1940, and that at the time of the purchase, there were no buildings upon the same; that the first lumber was delivered October 31, 1940; that the garage was built in less than two weeks having been constructed with lumber and a cement floor, size 22x24; that there were no water or sanitary facilities when the homestead was declared. That on the 14th day of November, 1940, the bankrupts, husband and wife, moved into the garage, and on the same date furniture consisting of a bed and some other items were moved into the garage. Bankrupts used a coaloil lamp for heating purposes and an oil heater for warmth. They carried their drinking water in a gallon jar to the garage from November to February. That the witness and his wife slept there on November 14, 1940 and continued to do so thereafter until a new home was constructed on said property in February, 1941. That during all of this time and up to February 6, 1941, they were renting a home from a man named Gagas situated about one mile and a quarter distant. That during the time they lived in the garage, they ate their lunch and had warm coffee when they were working in and around the premises. That witnesses' two minor daughters and two sons were living at the Gagas house during this time; that neither the witness nor his wife slept in the Gagas house from November 14, 1940, but they ate their breakfasts

and dinners there until the 9th day of February, 1941.

The Gagas house, which they were renting, was comfortably furnished and serviced with running water, heating and sanitary facilities and electricity; here their two sons and two minor daughters lived and slept until a house was built on the homestead property. Most of the family foodstuffs were kept at the Gagas house.

Deveine Floy Turnbeaugh, bankrupt and wife of the preceding witness testified substantially to the same facts as the husband. She stated that her husband was principally engaged as a contracting painter during this period and that all of the household activities, such as washing, bathing, cooking, etc. were carried on at the [23] Gagas premises; that some of their clothes were kept in each place.

W. C. Alley of the Pacific Gas & Electric Company, testified that the lighting meter was installed at the garage to supply lighting service and an electric range on February 1, 1941.

Sam Van Dyken testified that he installed a pressure system on the premises on the 28th day of January, 1941, and that the electrical wiring was installed January 21, 1941.

George Baumgardner testified that he drilled a well on said premises during the last days of December, 1940, and that Turnbeaugh was not there when he moved on the job. He had contacted him at the Gagas residence; that he saw no evidence of any one sleeping there at the time, but saw Turn-

beaugh doing some carpenter work there on a later occasion.

Florence McGurk, a close friend of the family, testified she visited the bankrupts on November 14, 1940 at the garage on the premises about 7:00 or 8:00 o'clock in the evening and that she observed a bed-room set there and that the bed was made. She further testified she saw the bankrupts' little girls sleeping there in the garage in the latter part of November, 1940, during the time when these children had the flu (no one else testified to the children sleeping there in the garage). This seems particularly incredible that the parents would keep sick children in an unheated garage when they had a warm, comfortable home about a mile and a quarter away.

Mrs. Clarice Therman testified that she was a neighbor, who lived about a block and a half away; that she saw the garage being built the latter part of November; that it was completed shortly after Armistice Day, 1940. That she saw lights there and and a car in the garage; that she visited at the garage home to collect for the Red Cross Roll call.

Clem M. Mulholland testified that she had visited the bankrupts at the Gagas house and the garage on several occasions; that she had gone to the garage quarters in question during the month of November, 1940, one week before Thanksgiving about 9:00 o'clock p.m. for the purpose of calling Mr. Turnbeaugh to come to answer a telephone call at her home; that she went to the garage quarters a number of times during the month of November, 1940.

That while visiting the Turnbeaugh's, she observed a bed, some sort of a rug on the floor, etc. [24]

Lyle Turnbeaugh testified that he was a son of the bankrupts and that his parents stayed at the garage every night from November 14th on; that he and his brother and two sisters stayed at the Gagas house until after the 1st of the year when they moved into the new house on the premises.

Discussion by Referee of the Facts and Citations
In Support of His Findings

The evidence is vague and conflicting as to whether bankrupts actually slept in the garage prior to and at the time of the declaration of homestead. The Referee is convinced that there was no bona-fide actual residence on the premises in question. Assuming that the bankrupts "went through the motions of a residence", it could be no more than that of a token character; in other words, purely a gesture of attempt to comply with the statute, and it was of a sham and fictitious character. The evidence shows a lack of honest, genuine present intent to actually reside on the premises at the time of the declaration. The witnesses for the bankrupts could be very honestly mistaken as to the time when they saw the Turbeaugh's residing on the premises.

The testimony of the witness, who saw the children of the bankrupts lying in bed in the garage, sick with the flu, is absolutely incredible. It is a well-known fact that this was a cold, dreary, wet winter and these bankrupts had a warm, comfortable house with all facilities a mile and a quarter away from the garage.

The claim of bankrupts is fantastic. Is it credible that throughout a cold, dreary, wet winter, with chilling winds and driving rains and frost, that claimants lived in a garage without any ordinary facilities of living when they had a warm, comfortable, well-furnished home, with a family of young children, [25] a mile and a quarter away? Can one imagine refined people like these dressing and undressing on a cold concrete floor in the dampness of winter nights; no water, hot or cold for bathing; no toilet, not even a privy on the place; no place to keep their clothes free from dust; no cooking facilities sufficient to make a cup of hot tea and these people beyond middle age?

The Court is convinced that the bankrupts did not actually reside on the premises herein involved on November 15, 1940, and that any semblance of residence thereon, at the time of the declaration, was not real, but sham and pretended and not bona-fide and genuine. Inasmuch as the homestead statutes require actual residence at the time of the declaration of the homestead, it must follow that said homestead is invalid and of no force and effect whatever.

The law applicable to the facts of this case is contained in the following citations:

The statutes, relating to homestead, are of an humanitarian character and, of course, should be liberally construed to effect their purpose and in the spirit in which they were received. However, there are certain fundamental statutory requirements, which must exist to entitle the bankrupt to

his homestead exemption. One of these, and the only one necessary for us to consider at this time, is the question of residence. It is generally conceded by counsel that this is one of strict construction.

“In *Tromans v. Mahlman*, 92 Cal. 108, (27 Pac. 1094) the court said:

‘To effect its purpose, the statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. This the court has many times used and, emphasized the word “actually” to show that the residence must be real and not sham or pretended’.”

Lakas Archambault,

38 Cal. App. P. 371-2. [26]

“Concerning such evidence of intention, this court said in *Tromans v. Mahlman*, 111 Cal. 648 (44 Pac. 327), ‘whether she (the appellant) did in fact actually reside on the premises at the time the declaration was filed was a question of fact to be determined by the court from evidence before it’ . . .

“In the former appeal in that action *Tromans v. Mahlman*, 92 Cal. 1 (27 Pac. 1094; 28 Pac. 579) it was said: “It is settled law in this State that to constitute a valid homestead the claimant must actually reside on the premises when the declaration is filed (citing cases . . . The obvious purpose of the statute in providing for the selection of a homestead was to thereby

make a home for the family, which neither of the spouses could encumber or dispose of without the consent of the other, and which should at all times be protected against creditors. To effect its purpose, the statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. "The foregoing statement of the law was approved in *Bullis v. Stanford*, 178 Cal. 40 (171 Pac. 1064). (See also, 13 Cal. Jur. 554, and cases cited.)"

Johnston v. DeBrock,
198 Cal. at Page 1181

"It is settled law in this state that to constitute a valid homestead the claimant must actually reside on the premises when the declaration is filed. (*Prescott v. Prescott*, 45 Cal. 58; *Babcock v. Gibbs*, 52 Cal. 629; *Aucker v. McCoy*, 56 Cal. 524; *Pfister v. Dascey*, 68 Cal. 572; *Lubbock v. McMann*, 82 Cal. 228, (16 Am. St. Rep. 108).

Bullis v. Stanford,
178 Cal. at P. 45.

FINDINGS OF FACT

The order, upon which review is sought to be had, is heretofore set forth in this certificate and the reasons for holding said homestead to be invalid are also set forth herein.

Papers Handed Up Herewith:

I hand up herewith the following papers:—

- 1) Opinion of Referee upon question of exception to Trustee's Report of Exempt Property;
- 2) Order declaring homestead invalid; [27]
- 3) Petition for review of the order of the Referee;
- 4) Certificate of mailing notice of hearing to settle form of Referee's certificate on petition for review;
- 5) Transcript of testimony.

Dated: March 3, 1944.

STEPHEN N. BLEWETT,
Referee in Bankruptcy.

[Endorsed]: Filed Mar 4 1944. C. W. Calbreath,
Clerk. [28]

DECLARATION OF HOMESTEAD
(Wife)

Know All Men By These Presents: That I, Floy Turnbeaugh do certify and declare that I am a married woman, and that my husband's name is Ray Turnbeaugh, and that my husband, the said Ray Turnbeaugh has not made any declaration of homestead, and I therefore make this declaration for the joint benefit of myself and husband; that I do now at the time of making this declaration, actually reside with my family, consisting of my said husband and myself and Four (4) children on the land and premises, being all that real property in the County of San Joaquin, State of California, described as follows, to-wit:

A portion of the East 30 acres of the Southeast Quarter of the Southwest Quarter of Section 20, Township Two (2) South, Range Eight (8) East, Mount Diablo Base and Meridian, and more particularly described as follows, to-wit:

Commencing at the Southeast corner of the Southwest Quarter of said Section Twenty (20); thence North $89^{\circ} 13\frac{1}{2}$ West 60 feet to the West bank of Irrigation Canal and the point of beginning of the herein described parcel of land; thence North $89^{\circ} 13\frac{1}{2}$ West, 174.9 feet to a point; thence North $0^{\circ} 10\frac{1}{2}$ East to the Center of an Irrigation Ditch; thence along center of Irrigation ditch South $89^{\circ} 13\frac{1}{2}'$ East, 182.45 feet to the West bank of Irrigation Canal; thence South $1^{\circ} 49'$ West along West bank of said canal 263.25 feet to the point of beginning. Containing a 1.08 acres.

Subject to Irrigation ditch along the North line and County Road along the South Line thereof.

Acreage computed to include portion in road on South and Irrigation ditch on North.

That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling house thereon, and its appurtenances, as a Homestead, and I do hereby select, declare and claim the same as a Homestead.

That the actual cash value of said property, I estimate to be \$5,000.00 Dollars.

That no right of possession in and to said land and premises is vested in or exercised by any per-

son other than my said husband and myself, and that at the time of making this declaration, my possession or my said husband's possession is actual and rightful.

That the dwelling house and buildings located on said property are principally used for residence purposes, and uses incident thereto, and that said lands consist of contiguous and adjoining parcels.

[29]

That each and every declaration of homestead heretofore made by myself or by my said husband, or by us jointly, for the benefit of either of us or for our joint benefit, has been abandoned.

In Witness Whereof, I have hereunto set my hand, this 15th day of November, 1940.

FLOY TURNBEAUGH

State of California,
County of San Joaquin—ss.

On this 15th day of November, in the year nineteen hundred and Forty, before me, K. G. Poile, a Notary Public in and for said County and State, personally appeared Floy Turnbeaugh known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal] K. G. POILE,

Notary Public in and for said County and State.

AFFIDAVIT

State of California,

County of San Joaquin—ss.

Floy Turnbeaugh, being first duly sworn, deposes and says, that she is the declarant named in, and whose name is subscribed to the annexed declaration of homestead, that she has read the same and knows the contents thereof, and that the matters contained therein are true of her own knowledge.

FLOY TURNBEAUGH

Subscribed and sworn to before me this 15th day of November, 1940.

[Seal]

K. G. POILE,

Notary Public in and for said County and State.

[Endorsed]: Recorded at Request of Stockton Guaranty Title Co. Nov 20 1940 at 58 min. past 2 o'clock P.M. in Book of Official Records Vol. 719 page 16 San Joaquin County Records. John D. Finney, Recorder. Fees \$1.20. [30]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 9th day of March, in the year of our Lord one thousand nine hundred and 44.

Present: The Honorable Martin I. Welsh, District Judge.

No. 10150

No. 10151

In the Matters of

ORVEY RAY TURNBEAUGH,

DEVEINE FLOY TURNBEAUGH,

Bankrupts.

ORDER APPROVING REFEREE'S CERTIFICATE

The Certificate of the Referee on review of Order having been heretofore heard and submitted, being now fully considered, it is Ordered that the Referee's Certificate be and the same is hereby approved, and that the order of the Referee denying bankrupt's claim of exemption to homestead premises be and the same is hereby affirmed. [31]

[Title of District Court and Causes.]

NOTICE OF APPEAL TO THE U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT.

Notice is hereby given that Orvey Ray Turnbeaugh, bankrupt, and Deveine Floy Turnbeaugh, bankrupt, in the above entitled proceedings, and each of them, hereby appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit from the Order made and entered by the above entitled Court on the 9th day of March, 1944, approving the Referee's certificate and affirming the Order of the Referee denying the bankrupts' claim of [32] exemption to homestead premises.

The within notice is intended to constitute a joint and several appeal by the said Orvey Ray Turnbeaugh and Deveine Floy Turnbeaugh, said parties having joined in the filing of same pursuant to Rule 74.

Dated this 27th day of March, 1944.

ERNEST J. TORREGANO,
Attorney for Orvey Ray Turnbeaugh and Deveine
Floy Turnbeaugh, Appellants in the above en-
titled proceedings.

[Endorsed]: Filed Mar 28 1944. C. W. Calbreath, Clerk. [33]

[Title of District Court and Causes.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Orvey Ray Turnbeaugh, Bankrupt and Deveine Floy Turnbeaugh, Bankrupt, in the above entitled actions are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an Order of the District Court, In and for the Northern District of California, Southern Division, dated March 9, 1944, confirming the Referee's Certificate, and an Order of the Referee denying Bankrupts' claim of exemption to Homestead premises;

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, American Surety Company of New York, a corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellants, that the said appellants will pay all costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00) to which amount it acknowledges itself bound.

It is further stipulated as part of the foregoing bond that in case of the breach of any condition thereof, the above named District Court may, upon ten days notice to the Surety, American Surety Company of New York, above named, proceed summarily in said action or suit to ascertain the amount which said Surety is bound to pay an account of

such breach, and render judgment therefor against said surety and award execution therefor.

Signed and Sealed at San Francisco, California, this 27th day of March, 1944.

AMERICAN SURETY COM-
PANY OF NEW YORK,

By L. T. PLATT,

L. T. Platt—President Vice-
President.

Attest B. D. SPERRY,

B. D. Sperry—Resident Asst.
Secretary.

Bond #837941-K

Premium \$10.00 per annum.

[Endorsed]: Filed Mar 28, 1944. C. W. Calbreath, Clerk. [34]

[Title of District Court and Causes.]

APPELLANTS' STATEMENT OF THE EVIDENCE AND EXCERPTS FROM TRANSCRIPT.

The above-entitled matters came on regularly for hearing on the 15th day of December, 1942, at the hour of 2:00 o'clock P.M. thereof, before Hon. Stephen N. Blewett, Referee in Bankruptcy, District Court of the United States, in and for the Northern District of California, Northern Division; the bankrupts, Orvey Ray Turnbeaugh and Deveine Floy Turnbeaugh, being represented by John O'Reilly, Esq., of Manteca, California; Nat Brown,

Esq., Attorney at Law, Stockton, California, appearing [35] as counsel for the Trustee; Messrs. Gumpert & Mazzera of Stockton, California, by J. Calvert Snyder, Esq., appearing on behalf of Mary A. Santos, a creditor filing exceptions.

The following proceedings were had and testimony taken, to wit:

The Referee: I think the witnesses may go into the other office there and have a seat—those of them that can be seated—because we can't accommodate all of them.

Mr. Snyder: All witnesses may go out, then?

The Referee: Yes. And call them as needed.

Are these matters to be heard together?

Mr. Snyder: Yes, if the court pleases.

The Referee: The matter of Orvey Ray Turnbeaugh, bankrupt, and Deveine Floy Turnbeaugh, bankrupt, for the purpose of this hearing, the matters will be consolidated.

Mr. O'Reilly: That is right; that is agreeable.

Mr. Snyder: We would like to call first Mr. Turnbeaugh, may it please the court.

The Referee: Yes.

Very well, will you be sworn, please?

ORVEY RAY TURNBEAUGH

called and sworn as a witness on behalf of excepting creditor, Mary A. Santos, testified as follows:

That his name is Orvey Ray Turnbeaugh and his wife's name is Deveine Floy Turnbeaugh.

(Testimony of Orvey Ray Turnbeaugh.)

That they both have filed petitions in bankruptcy and in these petitions in bankruptcy they are claiming as exempt certain real property described in the petition and are claiming them as exempt on the ground that they filed a Declaration of Homestead against the property; that it is his wife's signature on the original Declaration of Homestead and that is the same Declaration of Homestead under which he is claiming exemption [36] under his petition in bankruptcy.

Mr. Snyder: May we offer this as the Trustee's Exhibit first in order, Your Honor?

The Referee: It may be received.

The property described in the Declaration of Homestead was purchased during the month of August, 1940, and at that time it had no building thereon; that he subsequently built some building upon it; that the first building which he built upon the premises was a garage; that the garage has a concrete floor in it, four sides, of course, and the roof; that he obtained the lumber to build the garage from Moorehead Lumber Company, Escalon; that the lumber was delivered to him on Thursday, Halloween, October 31st of 1940; that he built the garage in a little less than two (2) weeks' time; that the size of the garage is twenty-two by twenty-four (22x24); that at the time it was built there was no water in it; that on November 15 they were living on the premises, his wife and himself; that there was not anyone else living in the garage.

(Testimony of Orvey Ray Turnbeaugh.)

Q. What did you have to sleep upon in the garage? A. A bed.

Q. What kind of a bed?

A. A—(Witness producing document from pocket) we had a three-piece bedroom set, a spring and innerspring mattress, and we also had a library table and two rugs.

Q. And you put those in the garage, when?

A. November 14th.

Q. November 14th. Were they new?

A. They were new.

Q. Yes. A. No, they were used.

Q. Those were things that you had before?

A. No. [37]

Q. Where had you gotten them?

A. Majestic Furniture Company, Modesto.

Q. Had you used those in the premises that you had been renting from Mr. Gagas?

A. No, sir.

Q. Now, when you moved in there and were living there, what did you use for lights?

A. Coal oil lamp.

Q. One coal oil lamp?

A. One coal oil lamp.

Q. What did you use for water?

A. We carried our drinking water there.

Q. Where from? A. Gagas' place.

Q. Carried it from the Gagas place?

A. Yes.

Q. How far is that away?

(Testimony of Orvey Ray Turnbeaugh.)

A. Oh, I would say a mile and a quarter; maybe a mile and a half.

Q. And what did you use to cook on while you were there? .

A. The first few days we were there we had an oil heater, one of those kind that you carry around; we saw that that wasn't sufficient to warm the garage, and I had an old wood stove, a wood heater, we moved that in.

Q. How long were you carrying water from the Gagas place down there?

A. Well, let's see. Well, let's see, I carried water to drink up until at least February the 6th or 7th.

Q. In other words, you carried water from November until February?

A. I carried water to drink, yes.

Q. Why didn't you put your well in sooner? [38]

A. I——

Mr. O'Reilly: Just a minute, if the Court please. Objected to as immaterial.

The Referee: Yes, I don't see the materiality of that.

Mr. Snyder: Q. Did you make an effort to have a well put in sooner?

A. I made an effort, yes, and got a well in.

Q. When was it you first made the effort to get a well put in?

Mr. O'Reilly: If you know, now. If you know the date, approximately, you can give that information. Otherwise, if the Court please, I don't think it is material, either; object to it upon that ground.

(Testimony of Orvey Ray Turnbeaugh.)

What we are interested in here is when he actually moved on and lived in the garage in question, so far as his homestead is concerned.

The Referee: What was the question?

(Whereupon the reporter read the question.)

The Referee: That will be allowed. All the facts and circumstances surrounding the transaction, I think, are proper to be shown.

A. Well, as far as making the effort is concerned, I wouldn't be able to set an exact date on that, but if I remember correctly the well was started on December 24th and was finished December 26th, of 1940.

Q. Were you living there when George Baumgardner dug the well for you? A. Yes.

Q. You had this bed set, and everything there?

A. Yes.

Q. Cooking your meals there then?

A. No, didn't cook all our meals there.

Q. Where were you taking your meals?

A. We had our lunch; had warm coffee and we would eat our [39] lunch there when we would be working there on the place.

Q. Where would you eat the rest of your meals?

A. Where?

A. Yes.

A. I ate a number of them in restaurants.

Q. Isn't it—— A. And——

Q. Pardon me, were you through?

A. Yes.

Q. You recall renting a place from Mr. Gagas?

(Testimony of Orvey Ray Turnbeaugh.)

A. Do I recall renting a place from him?

Q. Yes. A. Surely.

Q. When was the last time you paid Mr. Gagas rent on the place that you were renting from him?

A. The last time I paid him rent—the last time I paid him any money was—wait a minute. (Pause). October 9th.

Q. You are sure you paid Mr. Gagas no rent in November and December and January and February? That is, November and December of 1940, and January and February of 1941?

A. Yes, I paid him rent, but not cash.

Q. But you paid rent, didn't you?

A. Yes.

Q. That's right? A. I paid him.

Q. And what were you paying that rent for during those months?

A. The rent that I traded out with him. There were three months rent that I traded out with him.

Q. What months were those?

A. Up to February 9th.

Q. And what was that rent for, rent on what?

A. Rent on what? [40]

Q. Rent on what, yes.

A. Rent on the Gagas house.

Q. That is the house you had been living in?

A. Yes.

Q. Prior to the time you purchased this place?

A. Yes, sir.

Q. And prior to the time you built your home?

A. Yes.

(Testimony of Orvey Ray Turnbeaugh.)

Q. And the last month that you paid rent in was February of 1941, that is correct, isn't it?

A. Now, just what do you mean by that?

Q. The last time you paid rent, whether you gave it by service or whether you paid cash, the last month's rent for the premises that you had been living in that belonged to Mr. Gagas was in February of 1941?

A. Paid up to February 9th.

Q. Of 1941?

A. Yes, that's right.

Q. That is correct. What did you have in these premises that you were renting from Mr. Gagas from October to February the 9th?

A. What did I have in it?

Q. Yes. Did you ever sleep on those premises during that period of time?

A. We didn't sleep there from November 14th, no.

Q. You did not?

A. No.

Q. Not a single night?

A. No, not a single night.

Q. All right. Did you eat any meals there?

A. Yes.

Q. What meals did you eat?

A. Breakfast and dinner. [41]

Q. Most of your breakfasts and dinners were eaten there prior to the time that your house was built, isn't that true?

A. Prior to the time the house was built?

Q. Yes, in other words, you ate your breakfast and dinner there while you were building the house

(Testimony of Orvey Ray Turnbeaugh.)

on the premises that you have homesteaded, isn't that right? A. Surely.

Q. But you say you and your wife did not sleep there during that period of time?

Mr. O'Reilly: That has been asked and answered, if the Court please; objected to upon that ground.

The Referee: I believe that the witness has stated that neither of them slept on the Gagas premises after the 14th of November.

Mr. Snyder: I understood him to mean only himself. I may be in error there.

The Referee: Oh, yes. Well, in order to clear that up, I will allow the question.

Mr. Snyder: Q. When you said that you didn't sleep on the Gagas property from the 14th until February the 9th, 1941, were you referring to just yourself, or to your wife and yourself, both?

A. I am referring to my wife and myself.

Q. Did any of your family sleep in the Gagas house from November 14th up to and including February 9th? A. Yes.

Q. Who?

A. Lyle, and Harley and my two little girls.

Q. Your two little girls and your two boys?

A. Yes.

Q. And they slept in the Gagas property until you got your home or house built on the homesteaded property? [42]

A. Until we got it so we could move them in.

Q. That is what I mean, yes. Now then, where

(Testimony of Orvey Ray Turnbeaugh.)

did you keep your clothes from November 14th up to February 8th, 1941?

A. I kept my—most of my clothes in the garage.

Q. Did you have any of your clothes in the place that you were renting from Gagas' during that time?

A. I think an old overcoat that I don't wear anymore.

Q. Is that all?

A. And there might possibly have been a pair of work overalls there a time or two, to be washed.

Q. But all of your other good clothes you kept out in the garage? A. My good clothes, yes.

Q. How did you keep them hanging up, in the garage, or did you have a cabinet there you kept them in? A. Why, hanging up.

Q. You hung them around the garage?

A. No, not around the garage; we hung them up in the corner.

Q. And during that time, of course, they were putting up the electric wires and things of that sort, in the garage? A. No.

Q. Is that right? A. No.

Q. When was the electric wiring put in the garage, before or after you started to live there?

A. After.

Q. How long afterwards?

A. I think the wiring was—our service was hooked up—well now, let me see.

Mr. O'Reilly: Do you have any data in your pocket to assist you?

A. Not on that, Mr. O'Reilly. [43]

(Testimony of Orvey Ray Turnbeaugh.)

Mr. O'Reilly: If you don't know, then you don't know.

The Witness: Okay.

Mr. Snyder: Q. Well, you don't know?

A. Well, I know approximately.

Q. All right, What is it?

A. I would say shortly after the first of February.

Q. Yes. And did you use the kerosene light or lamp up to that time, is that correct?

A. Kerosene lamp.

Q. Kerosene lamp. Now then, during the time from November 14th up to and including February 9th, 1941, you paid for the electricity on the premises that you were renting from Mr. Gagas?

A. Well, my boys paid for it.

Q. You didn't pay for it?

A. Lyle paid for it.

Q. As a matter of fact, Lyle is paying for the electricity on the premises you have homesteaded?

A. Yes.

Q. You have got that in his name?

A. No—the electricity, we never had it changed, that is all.

Q. In other words, there is no difference between the electricity as it stood prior to the time you started to build the property— A. No.

Q. And the present time, is there. You said "No", I believe. Now then, you say you cooked on a gas range or an oil range there for awhile when you first moved in.

(Testimony of Orvey Ray Turnbeaugh.)

A. How many times do I have to answer that, Mr. O'Reilly?

Q. I am asking the questions, Mr. Turnbeaugh.

A. Okay. We warmed up our coffee and we had sandwiches for our lunch, our noon meal, when I happened to be working on the place, between November 14th and February 9th. [44]

Q. Then I take it the only meals that you had on the homesteaded property were lunch goods and coffee?

A. That's right.

Q. From November 14th up to February 9th. Now, I call your attention to your Declaration of Homestead: You said that your four children were residing with you on these premises which you homesteaded beginning on November 14th, and thereafter. You have seen that in the Declaration of Homestead, have you?

A. Yes, sure.

Q. And you swore to that, didn't you?

Mr. O'Reilly: No, that is Mrs. Turnbeaugh's signature.

Mr. Snyder: Q. Floy and Ray. Floy is the wife.

A. Yes, sir.

Q. Now, so far as you know, none of your children took any of their meals, their lunch meals there from the period of November 14th up to February 8th?

A. Yes, they did.

Q. Which one?

A. Their lunches, when they happened to be there.

Q. When was that prior to November?

A. Prior to November?

(Testimony of Orvey Ray Turnbeaugh.)

Q. Yes. A. Before November.

Q. November 14th or 15th, prior to November 14th, who ate their lunch of the children?

Mr. O'Reilly: That is objected to, if the Court please, on the ground it is immaterial; the Declaration of Homestead was made on the 15th of November.

Mr. Snyder: We will withdraw the question.

Mr. Snyder: Q. Did any of your children that you can recall ever have any lunch on the homesteaded premises prior to November 15th, 1940?

[45]

A. Well, the same thing you just asked me. No.

Q. None of them? A. No occasion to.

Q. And did any of the children keep any of their clothes on the homesteaded premises prior to November 15th, 1940? A. Prior to that date?

Q. Yes. A. No.

Q. Did they have any of their clothes on the premises on November 15th, 1940? A. Yes.

Q. Which ones, and what clothes?

A. I don't remember which ones, but there was a pair of overalls hanging there that wasn't mine, so it was one of the boy's.

Q. Outside of this one pair of overalls, there was none other? A. Not that I can recall.

Q. And none of the children slept there prior to or on November 15th, 1940, did they?

A. Prior to?

Q. On or, either one.

A. Yes, prior to they did.

(Testimony of Orvey Ray Turnbeaugh.)

Q. Which children slept there?

A. Lyle and Harley.

Q. And did they sleep there every night?

A. One or the other of them did.

Q. Where did they sleep? A. In a tent.

Q. You had a tent outside of the garage?

A. We had a tent outside.

Q. When did you put the tent up?

A. Halloween night, Halloween evening, October 31st.

Q. And who stayed there that night, Halloween Eve, October 31st? [46]

A. I rather think both of them did.

Q. You and Mrs. Turnbeaugh were not there?

Mrs. Turnbeaugh: No.

The Witness: Ask that again.

Mr. Snyder: Q. Mrs. Turnbeaugh didn't stay there on October 31st? A. No.

Q. The boys helped you build the garage?

A. They poured—they helped pour the cement floor. I don't recall that they helped at all on anything else.

Q. And, as I understood it, you began building on the day after Halloween?

A. We poured the floor, we poured the floor on Sunday, which would have been November 2nd.

Q. November 2nd. Now, outside of this tent and this garage were there any other buildings on the premises at the time? A. No.

Q. And there were no other buildings on the premises on November 15th, 1940, other than this

(Testimony of Orvey Ray Turnbeaugh.)

garage and tent. Now, what did you have inside of the garage, say, on November 15th, 1940? Just the bed and these things that you have told us about?

A. Yes.

Q. No running water? A. No.

Q. And no sink or anything of that sort?

A. No.

Q. I take it, then, that you had no toilet facilities?

A. Well, we used toilet facilities; we had none, but we used toilet facilities. That is usually figured out some way or other.

Q. There was no particular provision made for it? A. Not on the 15th.

Q. Now, the bulk of your furniture was in the premises that you [47] were renting from Mr. Gagas on November 15th, 1940, wasn't it? A. Yes.

Q. And the bulk of your foodstuffs, that is other than the luncheon material, were over at Gagas' premises on November 15th, 1940?

A. That's right.

Q. About how far is the Gagas premises or are the Gagas premises, Mr. Turnbeaugh, from the property that you homesteaded?

A. It is either a mile and a quarter or a mile and a half. Approximately that.

Q. And on the Gagas premises you had a Rural Free Delivery box, didn't you? A. No, sir.

Q. You did not. Where did you get your mail?

A. Post Office Box 57, Ripon.

(Testimony of Orvey Ray Turnbeaugh.)

Q. You got it there all of the time?

A. Yes.

Q. In carrying this water this mile and a half what did you carry it in, buckets or thermos bottles?

A. I had some canteens, and I had a gallon bottle.

Q. You carried the water to wash in, too?

A. No, I said drinking water.

Q. Well, did you carry your water to wash in?

A. No.

Q. Where did you get your water to wash in that you had on November 15th, 1940?

A. What water was used, outside of drinking, at that time the ditch, the irrigation ditch that goes along the east side of our property; which is possibly 30 feet from the garage. There is a big hole there right past the gates, cement gates there. There was a big hole out there, and that hole stood full of water there practically, well, all winter. [48]

Q. Did you get the cement that went into the garage from the same place you got the lumber?

A. Yes.

Q. You got the lumber for the house from the Ross Lumber Company, that was a different place?

A. That was a different place.

Q. And none of the lumber that you got from the Ross Lumber Company went into the garage. You didn't use any of the lumber from Ross Lumber Company in the garage?

A. Well, for the lean-to to the garage.

Q. Do you know whether or not your wife kept her clothes in the garage on November 15th, 1940?

(Testimony of Orvey Ray Turnbeaugh.)

A. You will have to ask her about that.

Q. You don't know anything about that?

A. Well, she kept some there, I don't know what clothes she has got; I couldn't name each piece.

Q. You saw some of her clothes there?

A. Yes.

Q. Where were they hanging, up on the wall?

A. Yes.

That he had none of the other buildings on the premises at the time he filed the Declaration of Homestead; that the house was not built then; the pressure system, the electrical fixtures and the pumping system were not in then; that the estimated the value of the entire premises on November 15th, 1940, the date the Declaration of Homestead was placed on the property, at Five Thousand Dollars (\$5,000.00); that he wouldn't have taken Five Thousand Dollars (\$5,000.00) for it that day.

Q. I see. After that you put on all the houses?

A. It was all figured out, I knew just what I was going to do.

Q. Will you answer my question, please? You figure the lot and the garage as it stood on the day you put on your Declaration of [49] Homestead, was worth five thousand dollars, is that right?

Mr. O'Reilly: There is no evidence, if the Court please, to show that this is the lot.

Mr. Snyder: Well, an acre and a half; we won't quibble over that.

Mr. O'Reilly: It is worth quibbling over.

(Testimony of Orvey Ray Turnbeaugh.)

Mr. Snyder: Q. The real property described in the Declaration of Homestead, together with the garage that was on it at that time, you figured the value to be as of November 15th, 1940, five thousand dollars?

A. Yes, sir.

Q. And after that you added these other improvements. And how many rooms has the house got in it?

A. Six rooms.

Q. Six rooms. Is it a frame house?

A. Frame house.

Q. A six-room frame house. How many bathrooms in it?

A. One.

Q. One bathroom. And a pressure system?

A. Yes.

Q. And electrical fixtures and all that sort of thing?

A. Yes

Q. Did you landscape it afterwards, too?

A. Yes.

Q. And what would you say the value of the house alone is, Mr. Turnbeaugh?

A. The house alone? Oh, the house alone would have cost—would have cost right at \$4200.00, I would say.

Q. Then I assume that your present value of the property is around \$9200.00?

A. No.

Q. Well, will you explain yourself. You say the value without [50] the house on it is five thousand you figure the value of the house at forty-two hundred.

A. I can explain it, yes.

Q. Yes

(Testimony of Orvey Ray Turnbeaugh.)

A. I knew what I was going to build there and what I would have when I got it completed. I had negotiated on a loan, a loan was coming up to build the house, and the fact of the matter is, we had the corner stakes placed for the house that we were going to build, and we had our plans. I knew what was going to be there. I was going to make it my home. And that is the reason that I placed a valuation—I wouldn't have taken five thousand dollars for it on November 15th, knowing about that.

Q. With just the garage there? A. Yes.

Mr. Snyder: That is all.

Mr. O'Reilly: No questions.

DEVEINE FLOY TURNBEAUGH,

called and sworn as a witness on behalf of excepting creditor, Mary A. Santos, testified as follows:

That it is her signature on Trustee's Exhibit No. 1 for identification on the bottom of the first page and she swore to it before Notary Public K. G. Pale when she signed it; that the only building at the time that she swore to the Declaration of Homestead was a garage.

Q. And it was after you filed this Declaration of Homestead that this five-room house was built, and these other things were put on it, isn't that true? A. Yes.

Q. I take it, then, that you felt that the real

(Testimony of Deveine Floy Turnbeaugh.)

property described in this Declaration of Homestead, together with the garage, were worth five thousand dollars on the day you signed this? [51]

A. Well, it was to me.

Q. It was to you? A. Yes, sir.

Q. Then if it was worth that much to you at that time, the addition of these other buildings increased its value to you later, isn't that true?

A. Well, in a way, maybe. Well, not in value of money, it didn't.

Q. Now, when did you move on the premises yourself? A. November 14th.

Q. By "Move on" what do you understand me to mean? A. Well, we slept there.

Q. You slept there?

A. We moved our furniture in there and slept there; that is, the bedroom set—

Q. Yes.

A. (Continuing) that you already know about.

Q. The first night that you slept there was when?

A. November 14th.

Q. November 14th. And your dinners and breakfasts you had been eating over at the Gagas property? A. Yes.

Q. And you continued to eat them over there after November 14th, 1941, didn't you, that is correct, isn't it?

A. After November 14th, well, certainly.

Q. Yes. And your two little girls continued to sleep and eat over in the Gagas property up until February of 1941, February 9th, to be exact?

(Testimony of Deveine Floy Turnbeaugh.)

A. Well, yes.

Q. And I don't suppose you took all of your clothes and dresses and things over—

A. Well— [52]

Q. (Continuing) to the garage?

A. Well, I took some of them. I don't recall whether I took everything that I owned or not, but I took some of them.

Q. You moved your bedroom set on the premises on November 14th? A. Yes.

Q. In the morning or in the afternoon?

A. It was right after lunch, I believe it was.

Q. And where did the bedroom set come from?

A. From the Majestic Furniture Company in Modesto.

Q. And you had hauled or taken your clothes over before the bedroom set came?

A. After the bedroom set.

Q. In the afternoon?

A. I moved the bedding and the night clothes and our clothes there in the evening of November 14th.

Q. That is your husband's and yours?

A. Yes.

Q. And what eating facilities did you have on November 14th, 1941?

A. The little oil heater.

Q. I mean 1940.

A. Just one of those little coal oil. We only kept it a day or two, and then we put in a wood stove because it wasn't of sufficient warmth.

(Testimony of Deveine Floy Turnbeaugh.)

Q. And you had no running water then?

A. No.

Q. You had no modern washroom facilities then?

A. No.

Q. You had none whatever, really?

A. No, none.

Q. No foodstuffs was kept on the premises?

A. Well, we just—just enough to make our coffee and lunch. [53]

Q. Well, when did you bring that over, on the 15th or the 14th?

A. Oh well, we kept bringing it in whenever we needed it. I wouldn't be able to say exactly.

Q. Well, if you moved in on the afternoon of the 14th I don't suppose you had anything there on the 15th yet, did you?

A. I don't remember whether we ate lunch there the next day or not.

Q. So far as you can recall you hadn't eaten anything, any meals, on the premises prior to November 15th, 1940?

A. Yes, I believe when we was building the garage, while we were working there we ate there, too; would take our lunch and eat there.

Q. Lunch stuff?

A. No regular cooking, but coffee.

Q. Do you remember what time of the day it was that you executed this Declaration of Homestead?

A. What time of day?

Q. Yes.

(Testimony of Deveine Floy Turnbeaugh.)

A. Well, I believe before dinner; I wouldn't say for sure. I am pretty sure it was in the morning, though, before lunch.

Q. Where was it executed?

A. Why, in Mr. Galt's office in——

Q. Stockton?

A. Stockton. What do you call it?

Q. Stockton?

A. Guaranty—Guaranty & Title.

Q. I take it that you came in and discussed this Declaration of Homestead with him before you prepared it?

A. We had spoke—I suppose I can go into detail?

Q. Yes, I want you to, please.

A. On the 15th of October we finished up our deal, got our [54] deed, and my husband said he wanted to put a homestead on the place, and he says, "You absolutely can't put a homestead there without living there."

Q. I see.

A. Sleeping there. So he gave us thirty days to put that building up and sleep there. That is the reason that we slept there the night of November the 14th, so the 15th would be our thirty days.

A. I see. Then the first and only night that you slept there prior to November 15th, 1940, was the 14th?

A. Was the 14th.

Q. Am I correct?

A. Of November.

(Testimony of Deveine Floy Turnbeaugh.)

Q. And on the 15th did you have your breakfast and dinner over at the Gagas property?

A. I believe.

Q. And all of your furniture, other than this one bedroom set, was over at the Gagas property on the 15th of November, 1940?

A. Yes. I don't think we had brought down anything yet at that time.

Q. This bedroom set that was in the garage, that was a new one that was purchased?

A. Well, it was a secondhand bedroom set.

Q. I mean, it wasn't any of the furniture that you had been using when you lived over at the Gagas property? A. No.

Q. Now, you and your husband were the only ones who slept there on the afternoon—or the evening of the 15th of November, 1940?

A. On the 15th?

Q. Yes—the 14th, I beg your pardon.

A. Yes.

Q. The 14th? [55] A. Yes.

Q. Do you remember how long it was—the next day it was, it took you to prepare this homestead, were you in Stockton most of the next morning?

Mr. O'Reilly: If the Court please, I think that is immaterial.

Mr. Snyder: I will withdraw the question.

The Referee: Very well.

Mr. Snyder: Q. You don't remember what time of day you came into Stockton to prepare this homestead?

(Testimony of Deveine Floy Turnbeaugh.)

Mr. O'Reilly: Just a minute. If the Court please, objected to upon the ground it has been asked and answered.

Mr. Snyder: She thinks in the morning.

Mr. O'Reilly: Well, that is the answer.

A. Well, in the morning, but I don't know the time of day of the morning. I know it was before lunch.

Mr. Snyder: I see. Now, on the 15th—let's see if I'm correct on this—what clothes did you have other than your working clothes over at the premises that you homesteaded?

A. Well, I had a coat—the one that I had was a good coat, my dress coat at that time, and of course my night clothes, and I believe that I had a house-dress or two there.

Q. The majority of your clothes, however, were over at the Gagas property, Mrs. Turnbeaugh?

A. Well, I imagine I left my best clothes there for the time being.

Q. Did you sleep in the Gagas premises at all after November 15th?

A. I didn't, not a night.

Q. Not a night. Now, on November 15th you had no eating or cooking facilities other than this little gas——

A. Nothing but the coal oil. [56]

Q. Coal oil burner? A. At that time.

Q. And you had no cooking utensils, I take it, other than a coffee pot, in the house?

(Testimony of Deveine Floy Turnbeaugh.)

A. Well, I don't remember. It seems like I might have had—Well, I won't say, I don't have any memory.

Q. In other words, a coffee pot is about all that would fit on top of a coal oil heater, isn't it?

A. Yes, or a kettle for heating water.

Q. I take it that a lot of your other personal effects, like your papers——

Mr. O'Reilly: Now, just a minute, if the Court please. Go ahead.

Mr. Snyder: Q. (Continuing): ——and medicines and things that an individual collects through a lifetime, the majority of those things were kept on the Gagas property and were on the Gagas property on November 15th, 1941 (1940)?

Mr. O'Reilly: Objected to as immaterial.

The Referee: Well, the objection is overruled. I think it is material.

Mr. Snyder: Q. Will you answer that for me, please?

Mr. O'Reilly: Objected to, further, upon the ground that it is assuming something not in evidence.

The Referee: It might be.

Mr. Snyder: Q. You, in a lifetime, of course, have collected a lot of knickknacks and things of that sort that you keep, keepsakes and things of that kind? A. Not very many.

Mr. O'Reilly: Just a minute. Objected to, calling for conclusion of the witness.

(Testimony of Deveine Floy Turnbeaugh.)

Mr. Snyder: Q. You have some, is that correct?

The Referee: Just a moment. [57]

Mr. Snyder: I will withdraw the question. I will reframe it.

Mr. Snyder: Q. All of your receipts and legal papers that you had acquired and kept—Do you keep them, by the way?

A. Do I keep them?

Mr. O'Reilly: Just a minute, Mrs. Turnbeaugh. The same objection, if the Court please.

The Referee: What is the objection?

Mr. O'Reilly: The objection is, assuming something not in evidence, and it is immaterial and it is calling for conclusion.

Mr. Brown: If your Honor please, this is an examination on behalf of creditors, and the question of whether or not this homestead is valid goes to the question of the good faith of the transaction, and that being so, it has been repeatedly held in these matters that this examination should assume the widest latitude; this is a matter in which we have creditors who are interested, who have moneys coming, and this is either their property or it is not their property, and therefore the technical objections interposed by counsel are entirely out of order.

The Referee: Well, I might say this: On a general examination there is a very wide latitude, but here we have a side issue in dispute, and I think probably we should be bound a little more closely to the rules of evidence.

(Testimony of Deveine Floy Turnbeaugh.)

Mr. O'Reilly: Now, if the Court please, it is understood that rather than to have me object continuously here, the original objection made is stipulated to, is it not, that as to each and every question asked the same objection applies?

Mr. Brown: The objections from now on are the ones we are concerned with; we feel that it is directly within our rights to ask these questions. This is an attack upon a homestead.

Mr. O'Reilly: It is stipulated? [58]

Mr. Brown: You can object from now on. We submit, if Your Honor please, this is a part of Section 21-A examination, and therefore really, properly, no objection is to be made.

The Referee: Well, this bankrupt is claiming this homestead.

Mr. Brown: Yes, Your Honor.

The Referee: And I think any questions material to its validity, in asserting its validity may be asked by the Trustee.

Mr. Brown: Yes, Your Honor.

The Referee: And I will overrule the objection.

Mr. O'Reilly: The validity, however, in this instance, as I understand it, and in accordance with the petition that is already on file, is that they were not living on there when the declaration was made.

The Referee: Of course, all the elements necessary to a homestead, the value, whether it exceeds the value of \$5,000.00, whether they were actually residing on it at the time, are pertinent matters of inquiry.

(Testimony of Deveine Floy Turnbeaugh.)

Mr. Brown: I am reading from the Declaration: "That I do now, at the time of making this declaration, actually reside with my family, consisting of my said husband and myself and four children."

Now, is counsel going to have us believe that that is untrue?

The Referee: Well, ask the questions.

Mr. Brown: Q. Will you tell us, then, Mrs. Turnbeaugh, whether or not the sum of \$200.00, being the sum testified to by your husband, was the fair and reasonable market value of the garage which was on the premises when you first slept therein? A. Well, I guess so.

Q. You guess so. Now, will you tell us what you meant when at the time you swore to this declaration you said that the actual [59] cash value of the property at that time you estimated to be the sum of \$5000.00?

Mr. O'Reilly: That is objected to on the ground it is argumentative.

The Referee: Well, she may have some good reasons for her statement.

Mr. O'Reilly: The document speaks for itself.

The Referee: I don't know; let the witness state.

A. Well, to me—I had been married twenty-seven years.

The Referee: Objection overruled.

A. (Continuing): And never owned a piece of property, never had anything. And to me that place was worth five thousand dollars, if it was worth a dime.

(Testimony of Deveine Floy Turnbeaugh.)

Mr. Brown: Q. Were you told that it was your own idea of the value or the actual reasonable market value at the time you executed the homestead, by your counsel?

Mr. O'Reilly: If she had counsel.

Mr. Brown: Q. Well, were you advised when you made this homestead?

A. Well, only by Mr. Galt.

Q. Yes. You went to Mr. Roy Galt, who is manager of the Stockton Guaranty Title Company, didn't you? A. Yes.

Q. And you counseled with him about putting on a homestead, didn't you?

A. We asked him about it, yes.

Q. Yes. And you understood him to be the manager of the Stockton Guaranty Title Company at the time?

A. And expected what he told us to be absolutely on the up and up.

Q. And you told him the facts?

A. Yes, sir. [60]

Q. And it was upon the facts that you related to him that he advised you what to do, isn't that correct? A. Yes, sir.

Q. That's right. Now, at that time did you have a judgment owing against you by Dick's Service, of Pomona, California?

Mr. O'Reilly: I think the record, if you have one there, Mr. Brown, is the best evidence.

The Witness: I think so, yes, I believe so.

Mr. Brown: Q. You did. And at that time

(Testimony of Deveine Floy Turnbeaugh.)

did you have claims owing to the Stockton Merchants Association for collection in favor of the Turner Hardware Company of Escalon?

A. Yes.

Q. What was your answer? A. Yes.

Q. And at that time did you have a judgment against you——

A. They weren't against me, those bills weren't against me; they were against my husband.

Q. Well, didn't you list them as judgments against yourself? Isn't that your signature, isn't this your signature?

A. Well, they are—they were listed as our debts, of course.

Q. Well, you swore that they were against you, didn't you?

A. Well, they were against me, but as we went on I don't think that that was considered—I don't suppose that at that time it was considered things that was his—of course we put them in together. I don't know.

Q. Well, you swore that these were your debts, didn't you?

Mr. O'Reilly: That is true; it is so stipulated.

A. Well then, I guess they would be considered my debts as well as my husband's.

Mr. Brown: Q. And at that time did you owe a judgment to Barbara Gordon as nominal plaintiff for the Acme White Lead Company? [61]

A. Yes.

(Testimony of Deveine Floy Turnbeaugh.)

Q. And at that time did you owe the Ross Collection Agency a bill in favor of Highiet's Wrecking Company? A. Uh-huh (affirmative).

Q. And at that time did you owe other of the various creditors whose claims you have listed in your bankruptcy, to wit, at the time of the execution of this homestead, Declaration of Homestead?

A. Yes.

Mr. O'Reilly: Objected to——

Mr. Brown: Q. You did.

Mr. O'Reilly: Same objection, if the Court please, as I made in the beginning; it applies to each and every one of those questions.

Mr. Brown: It goes to the question of the good faith of the declaration, if your Honor please.

The Referee: Objection overruled.

Mr. Brown: Q. And did you not, Mrs. Turnbeaugh, discuss this matter with your husband and jointly come to the conclusion and thereupon declare your homestead on this property, with the sole intent and purpose of defrauding and preventing these creditors from recovering their just debts against you? A. No.

Mr. O'Reilly: Just a minute, if the Court please.

A. I wouldn't say that.

Mr. Brown: Q. What is that?

A. They were old debts, but they were not the main debts.

Q. You owed them, didn't you?

A. Certainly.

(Testimony of Deveine Floy Turnbeaugh.)

Q. And you owed them that money at the time you declared your homestead?

A. Well, what do people usually put a homestead on for?

Q. I don't know, I am asking you, Mrs. Turnbeaugh. Did you know [62] at the time that you made the Declaration of Homestead that you and your husband owed debts, including judgments in various parts of California? A. Yes.

Q. And did you not put on the homestead for the sole and express purpose, you and your husband, of preventing and defrauding these creditors from obtaining their just claims against you? Yes or no?

Mr. O'Reilly: Objected to, if the Court please, on the ground that it is not material to the issues here.

Mr. Brown: If Your Honor please, this is my purpose for this:—

The Referee: I believe that a person has a right to put on a homestead if—

Mr. Brown: Yes, Your Honor.

The Referee (Continuing): —the circumstances are sufficient to meet the statute. But many times they are sued and there is an attachment on their land and still they put on a homestead.

Mr. Brown: Yes, Your Honor. But the question of good faith is going to be in issue.

The Referee: I appreciate that it is a question of good faith. But I don't think it is necessary to pursue that because, as far as the debts are con-

(Testimony of Deveine Floy Turnbeaugh.)

cerned, they were all admitted to be owing at the time.

Mr. Brown: Just so Your Honor has my thought on this matter.

Mr. Snyder: The point that I have to make, and I think it is perfectly obvious: they put a Declaration of Homestead and claimed a value on the real property of five thousand dollars, and both of their testimony indicates they have in the back of their minds the construction subsequently of a house upon the [63] premises. Now, they go out and incur these bills with Mrs. Santos and the rest of them. A thousand dollars of this widow's money went into this.

Mr. O'Reilly: That is objected to——

Mr. Snyder (Continuing): That is not good faith.

The Referee: That is something you have to establish yet.

Mr. Brown: This is preliminary.

The Referee: I mean, as to the debts that were owing, it is already admitted that they were owing; now, we will proceed to the debts that were incurred subsequently and for what purpose they were incurred.

Mr. Brown: Very well, Your Honor.

Mr. Brown: Q. Now, when the Moorhead Lumber Company bill that you have listed in your schedules—and your schedules were filed in this matter on August 7th, 1942—for what account was that

(Testimony of Deveine Floy Turnbeaugh.)

incurred, for improvements on the property or the garage?

A. Well, I think the biggest part of it was for paint that we had, that my husband had.

Q. Used where?

A. At different jobs that he used to be a painter on.

Q. Was any of that paint used in the construction of the improvements upon the land that is the subject of this homestead?

A. Well, you would have to ask him, I wouldn't know where they came from.

Q. You wouldn't know. The Ross Lumber Company of Modesto, for what was that bill incurred, do you know?

A. Well, that was the——

Mr. Snyder (Interposing): I think he already testified that that went into the house.

Mr. Brown: Q. Do you know? If you don't know, you just tell us so, Mrs. Turnbeaugh. After all, your husband—— [64]

Mr. O'Reilly: If the Court please, this is the second time that he is going over these same bills; it is reiteration of the same thing.

The Referee: These bills were not embraced in the question—at least, as to what purpose.

Mr. Brown: Do you want an explanation? Would Your Honor wish me to declare my purpose in this? I think it is very obvious; in other words, if these bills, if Your Honor please, went into the improvements upon this property, it again goes to the question of good faith.

(Testimony of Deveine Floy Turnbeaugh.)

The Referee: Oh, you may ask the question, but, nothing to counsel, I think probably this question is directed at an additional subject.

Mr. Brown: I want her to state, Your Honor, so if you will bear with me on this thing.

The Referee: That was inquired about, before.

Mr. Brown: May I proceed?

The Referee: I was doing that in explaining my ruling.

Mr. Brown: Q. Now, the Ross Lumber Company bill, for what was that incurred?

A. The Ross Lumber Company?

Q. Yes.

Mr. O'Reilly: If you know, Mrs. Turnbeaugh, if you don't know, so answer.

A. Well, it was—a part of it was on that lean-to on the garage, I think.

Mr. Brown: Q. On this same garage?

A. Yes.

Q. That you have testified about?

A. Yes. We built a lean-to onto it.

Q. And the Noah Adams Lumber Company at Suisun, what is that for? [65]

A. That is my husband's paint bills.

Q. And Dick's Service, what is that for?

A. That was gasoline.

Q. And the Turner Hardware Company, Escalon, what is that for?

A. That occurred about ten or twelve years ago, and it was paint.

(Testimony of Deveine Floy Turnbeaugh.)

Q. Had nothing to do with this property?

A. Nothing whatever.

Q. And Mrs. Mary Santos, what was that for?

A. My husband borrowed that money to help out with a paint job that he had, and we also paid some little various bills that we owed.

Q. Was that a secured or unsecured debt?

A. It was a note.

Q. A note. Any part of that money go into the construction of this property?

A. Not a cent of it.

Q. Not a cent of it. When did you get that money from Mrs. Santos?

A. On the 25th day of September, 1941.

Q. 25th day of September, 1941. And no part of that money went into this property?

A. No.

Q. You are positive of that?

A. Our house was completely built at that time.

Q. And then the Den Dulk Hardware Company of Ripon. What was that incurred for?

A. That was some tools.

Q. Used for——

A. Was used on the house.

Q. On the house? A. Yes. [66]

Q. The house that is the subject of this home-
stead, is that correct? A. Yes.

Q. And the Gensler Lee—no. The Roberts
Plumbing Company of Manteca. What was that
incurred for?

(Testimony of Deveine Floy Turnbeaugh.)

A. Well, it was some—Our plumbing bill went way over what was allowed, and that is what we did.

Q. On the improvements on this homesteaded property, is that correct? A. Yes.

Q. And the Acme White Lead & Color Works of Oakland, where did that bill go?

A. Well, that was a paint bill.

Q. Did it go into the homestead? A. No.

Q. No. And the Fuller Paint Company, where did that go?

A. I believe that was ladders or something of the sort.

Q. Latz Paint Company of Stockton, where did that go?

A. That, I don't know what that was.

Q. You don't know, Pittsburgh Paint Store in Stockton. Where did that paint go?

A. That was a sander, I believe, the renting of a sander. It wasn't for us.

Q. For where?

A. Wasn't for us. Work that was done in Suisun.

Q. Now, Mrs. Turnbeaugh, when you were living out at this place that was homesteaded, how far were you from the town of Ripon?

A. Well, I guess it is considered about a quarter of a mile. I don't know whether it is that far or not.

Q. About a quarter of a mile. And I suppose you did your shopping for your home in the town of Ripon? A. You mean groceries? [67]

(Testimony of Deveine Floy Turnbeaugh.)

Q. Yes, whatever you got, your provisions and supplies. A. Yes, mostly.

Q. And were any of these supplies delivered to you? And I am talking to you about the dates of November and December, 1940.

A. Were they delivered?

Q. Were they delivered to you? A. No.

Q. You went and got them? A. Always.

Q. And brought them to your home?

A. Yes.

Q. And when you went to get these supplies, including bread and flour and meat and other necessary provisions, did you bring them to this place where the garage was, or did you bring them to the house where the Gagas' lived?

A. I guess we took them to the house where the kids lived.

Q. Where the children lived. And did you have a washing machine? A. Yes.

Q. And did you do the children's washing?

A. Yes.

Q. What? A. Yes.

Q. And where did you keep your wash machine?

A. At the Gagas place.

Q. And did you have an ice box? A. No.

Q. Did you have any means of refrigeration?

A. No.

Q. You had no electric ice box? A. No.

Mr. O'Reilly: She said no means of refrigeration. [68]

(Testimony of Deveine Floy Turnbeaugh.)

Mr. Brown: Q. No means at all?

A. No, not there.

Q. What do you mean "not there"?

A. We had one and we let it go back, but I don't remember what date that was. But I don't think it was—I think it was before that time.

Q. Where did you have it, at which place?

A. At the Gagas place.

Mr. O'Reilly: That is objected to as incompetent, irrelevant and immaterial.

Mr. Brown: Q. Now, did you have any heaters?

A. Where?

Q. Well, wherever you had them. Did you have any heaters, any means of heating?

A. Well, had a circulating oil heater at the Gagas place, and we had the wood stove heater at the garage.

Q. Now, the children, of course, bathed in the usual way that all children do, didn't they?

A. Naturally.

Q. I am talking now about the months of November, December, January and February of 1941. Where did they do their bathing?

A. At the Gagas place.

Q. As a matter of fact, isn't this the truth, Mrs. Turnbeaugh——

Mr. O'Reilly: Now, just a minute.

Mr. Brown: Q. And isn't this the entire truth: that your actual and real and only home was the Gagas home, and the other place was a blind for the

(Testimony of Deleine Floy Turnbeaugh.)

purpose of preventing creditors from coming after you? A. No.

The Referee: Do you want to make an objection? I will sustain it, because that is really the point to be determined in the case, so it would be calling for conclusion of the witness. [69]

Mr. O'Reilly: However, I believe she has answered the question, if the Court please.

The Referee: That is a matter within the province of the Court to determine at the end of the hearing.

Mr. Brown: Q. Did you and your husband have tools—What is your husband's business, Mrs. Turnbeaugh?

A. My husband is ill and not able to do anything now, but he was a painting contractor.

Q. When you say he was a painting contractor, you mean in November, 1940?

A. He was at that time, yes.

Q. And he had, of course, certain scaffolding, he had ladders and paint and brushes and supplies and tools, did he not? A. Uh-huh.

Q. And in addition to everything else, he had an automobile truck? A. Well, yes.

Q. Well, did he or didn't he?

A. Well, one with a spray outfit on it.

Q. The one with the spray outfit on it. And what kind of a truck was that?

A. An old Ford.

Q. Beg pardon? A. A Ford.

Q. What year?

(Testimony of Deveine Floy Turnbeaugh.)

A. Golly, I wouldn't know.

Q. And that was a truck—a flat rack truck, as we call it?

A. It was built up for a spray outfit.

Q. Built up for a spray outfit. Where is it now?

Mr. O'Reilly: Now, just a minute, if the Court please. What are we here for anyway, to determine the validity of this homestead or to go into all—— [70]

Mr. Brown (Interposing): If Your Honor please——

Mr. O'Reilly: Just a minute, Mr. Brown.

Mr. Brown: Very well.

Mr. O'Reilly: If the Court please, to go into all these items when the time has passed for the examination thereof, or is this the hearing as to the homestead?

The Referee: Of course the time hasn't passed for an examination, but I believe we should restrict this hearing to the homestead.

The Referee: I think it would be well to confine this issue to the homestead; that is what we are here for. We are loading up a record here with a lot of other material and if this thing is reviewed it is going to have the upper court wondering where the issue is. So I think we had just better eliminate that and have the matter for a separate hearing.

ORVEY RAY TURNBEAUGH

recalled as a witness for and on behalf of the Trustee, testified as follows:

That he has been in Court during the examination of Mrs. Turnbeaugh by Mr. Snyder and Mr. Brown, and referring to the date of the execution of the homestead, trustee's exhibit No. 1, he did owe some money to the Moorehead Lumber Company of Escalon; that he did not owe any money to the Ross Lumber Company; that he owes some money to the Turner Hardware Company; that he did not owe any money to the Den Dulk Hardware Company; that he did not owe any money to Roberts Plumbing of Manteca, nor to the Acme White Lead & Color Works of Oakland; that he did owe some money to Highiet's Wrecking Company; that he did not owe any money to the Latz Paint Company of Stockton, nor to the Pittsburgh Paint Store of Stockton; that of those bills [71] which were incurred for improvements made on the real property were the Moorehead Lumber Company, Ross Lumber Company, Den Dulk Hardware Company, Roberts Plumbing and G. N. Hilburn and Albert Welty. That is all. That he owed other creditors money at the time the homestead was recorded; that at the time the homestead was recorded he owed Mrs. Bessie Woods, Dick's Service Station, Bank of America, Chino, Turner Hardware Company of Escalon, Standard Oil Company of Fresno, Highiet's Wrecking, Fuller Paint Company of Fresno, and Dr. Den Dulk, of Ripon. That is all. That at that time he could not

(Testimony of Orvey Ray Turnbeaugh.)

pay promptly his debts, including those named which he has just read off, as the same fell due upon the demands of the creditors; that he was not in his opinion insolvent but he could not pay his debts as they fell due.

Examination by Mr. Snyder:

Q. Mr. Turnbeaugh, when you borrowed money from Mrs. Santos, didn't you tell her that you were going to use it to pay for the Venetian blinds that went in your new home?

A. I didn't tell her that, no.

Q. You never, at any time? A. No.

Q. What did the \$1250.00 go for that you borrowed from Mrs. Santos?

A. It went to promote, to buy equipment, and to promote work, big work that I had coming up.

Q. The whole \$1250.00?

A. Yes. Let me explain.

Mr. O'Reilly: Go ahead and explain.

Mr. Snyder: Q. Go ahead; I am listening.

A. No, you are not.

Q. You go ahead.

A. I want you to hear this.

Q. You go ahead; go on. [72]

A. I have had angina for a number of years; it has gradually gotten worse.

Q. Yes.

A. Well, from, I would say, about the 1st of November in 1941 I had opportunities to figure big work, spray work, where I could make some money on it, and I had some work for C.P.C. over at Sui-

(Testimony of Orvey Ray Turnbeaugh.)

sun, and also some at Fresno for C.P.C., and this money, that was used to put the spray equipment in shape to handle the big work. It was something near \$400.00 that was spent on the outfit, hose, guns and pots, and I paid a hundred dollars—I have got a receipt for it here—on a car.

Q. Which car was that? A. The Mercury.

Q. By the way, where is that Mercury now?

A. I wouldn't know. I think my son has it yet. And I paid a note at the bank out of that that I owed, and I paid my son in back wages right at \$150.00, I don't remember the exact dollars and cents, and some small miscellaneous bills. There wasn't a cent of that money used on the house.

Q. And, as I understood it, you never told Mrs. Santos that?

A. I never told Mrs. Santos, no, I didn't.

Q. Did any of your family?

A. I wouldn't know.

Q. All right.

W. C. ALLEY,

called and sworn as a witness on behalf of the excepting creditor, Mary A. Santos, testified as follows:

That he is Supervisor for the Pacific Gas & Electric Company and has under his immediate supervision and control the records of the Pacific Gas & Electric Company installations in and around Manteca and Ripon; that he brought with him the rec-

(Testimony of W. C. Alley.)

ords of the installation for the Turnbeaugh's; that according [73] to the records, on February 1, 1941, there was a light meter installed there to supply lighting service and the electric range; that prior to that time they used to live on Murphy Ferry Road and that both of the accounts were kept in the name of Lyle Turnbeaugh.

SAM VAN DYKEN,

called and sworn as a witness on behalf of excepting creditor, Mary A. Santos, testified as follows:

That he is one of the partners of the N & S Home Appliance Company, electrical contractors; that he installed a water pressure system on the Turnbeaugh property which they had just recently purchased out by Manteca; that the first thing that was installed was the pump; that prior they installed a pitcher pump, a hand-operated pump; that the hand pump was installed January 21, 1941; and that the pressure system was installed on the 28th day of January, with the exception of the electrical work. That was completed on the 31st day of January. That was a temporary service to the garage and pump, and that included the installation of an electric range; that he installed it, himself. That he couldn't say when he put the electrical service in the garage, itself, whether he saw any bedstead there, a bed and bureau; that he didn't know as to whether or not he saw any cooking facilities or any-

(Testimony of Sam Van Dyken.)

thing of that kind, except that he installed the electric range at that time. That he can't recall whether there were facilities that could be used with the range at that time; that he has no recollection.

GEORGE BUMGARDNER,

called and sworn as a witness on behalf of excepting creditor, Mary A. Santos, testified as follows:

That his business is well drilling; that he drilled a well for Mr. Turnbeaugh on his new property recently; that he couldn't tell the exact date but they moved in around the 28th [74] and finished around the 2nd or 3rd of January, 1941; that when he went there to install or to dig this well, Mr. Turnbeaugh was not there at the time he moved in on the job; that he had to go to the other residence and get him to come down to show him where he wanted it. He believed he was up at the Gagas residence then. That at the time he moved in during the morning there was not anyone at all around the premises; that he did not see anyone sleeping around there; that he doesn't remember nor would he commit himself on that as to whether there was any evidence of anyone cooking meals or having any facilities for cooking meals around there when he went in there because he was not inside the building at all; no, he did not go inside the building.

Mr. Snyder: Q. Did Mr. Turnbeaugh, himself,

(Testimony of George Bumgardner.)

state anything to you about where he could be found? A. No.

Q. How did you know where to go, Mr. Bumgardner?

A. Well, the lumber company told me where I would find him.

The Referee: Well, I don't believe that would bind Mr. Turnbeaugh.

Mr. Snyder: No, that is correct.

The Referee: That may go out.

Mr. Snyder: Yes.

Mr. Snyder: Q. When you found Mr. Turnbeaugh that morning what was he doing, do you recall? A. He was in the house.

Q. He was in the house. And you had to ring the bell for him to come out?

A. Yes, or knocked on the door.

Q. Did you stay outside or did you go in?

A. I stayed outside.

Q. Do you remember about what time of the day it was? [75]

A. Oh, about 9:30 I would imagine.

Q. Now, you were digging that well from Christmas to New Year's Day, is that correct, in that vicinity?

A. No, I think we moved in about the 27th or 28th and finished after the first of the year, around the 2nd.

Q. Did anyone else come over there while you were digging the well besides Mr. Turnbeaugh?

(Testimony of George Bumgardner.)

A. Well, they were working there, doing some carpenter work, as I remember.

Q. On the garage?

A. Well, there was a little building there.

Q. Did you see Mrs. Turnbeaugh around at all?

A. I think she was there some of the time, yes.

Q. Some of the time. Do you remember any of them eating lunch there in your presence?

A. Not that I know of.

Cross-Examination

By Mr. O'Reilly:

Q. This little house that you refer to was already constructed then, was it not?

A. Well, they were doing carpenter work at the time I was there working.

Q. Putting up the lean-to, wasn't it?

A. Yes, I believe that is right, in the back, yes.

That the records which he has show only the date of the well, the date of the invoice that he sent to the lumber company and that he can show the date when he entered it in his book and sent them an invoice; that the book has 1941, January 1st and that is the first job in 1941 that he had, so he must have moved in about the 28th and finished it about the 2nd; that the record doesn't state when he moved in here to drill the well; that those are approximate dates; that he doesn't remember being there on the 24th day of December, 1940, in regard to drilling [76] this well and coming back the next day after Christmas to start to drill, nor does he remember conversation about Christmas dinner and

(Testimony of George Bumgardner.)

turkey, more or less, between him and Mr. Turnbeaugh; that so far as his records are concerned and his memory as to when he actually started to drill the well, it wouldn't be four or five days off one way or the other.

Q. Surely it wasn't December the 28th, 1941, was it? A. No, 1940.

Mr. O'Reilly: Q. So you believe, now, that you did move in there in 1940?

A. That is true, yes, it was 1940.

FLORENCE McGIRK

called and sworn as a witness on behalf of the Bankrupts, testified as follows:

Direct Examination

By Mr. O'Reilly:

Q. Will you please state your name?

A. Florence McGirk, M-c-G-i-r-k.

Mr. Brown: G-i-r-k? A. Yes.

Mr. O'Reilly: Q. On or about the 14th day of November, 1940, where did you reside, Mrs. McGirk? A. At Riverbank.

Q. At Riverbank. At that time were you acquainted with Mr. and Mrs. Turnbeaugh?

A. Yes.

Mr. Brown: Excuse me, Mr. O'Reilly. What date did you mention then?

Mr. O'Reilly: November 14th, 1940.

(Testimony of Florence McGirk.)

Mr. O'Reilly: Q. How long had you known them prior to that time?

A. Well, I have known them since 1929.

Q. 1929. And from 1929 on until November 14th, 1940, had you [77] visited in their home?

A. Very frequently. We happened to be neighbors practically all of those years.

Q. Oh, I see. Neighbors where?

A. Well, Escalon, and in Artesia, Southern California, and in Williams in Northern California.

Q. Now, did you visit with the Turnbeaugh's on or about the 14th day of November, 1940?

A. Yes, I did.

Q. And where?

A. Well, we went to Ripon to their previous residence on the Murphy Ferry Road and they were not there, Mr. and Mrs. Turnbeaugh were not home, and the children told us where they were, and it was in this new place they were constructing. And so we went from that residence to the new place.

Q. And did you have a conversation with Mr. or Mrs. Turnbeaugh there at the time?

A. Both of them.

Q. You talked to both of them. What time of the day was it, if you remember?

A. I should think it was between 7:00 and 8:00 in the evening.

Q. In the evening? A. Yes.

Q. And where were they at that time?

A. They had built a garage, and for the first time were going to sleep there that night.

(Testimony of Florence McGirk.)

Q. Well, how do you know?

A. Well, they had——

Q. Were they sleeping at the time?

A. No, no, they weren't sleeping at the time, but they were there and had had a bedroom set moved in and had their bed made and were ready to stay there that night. [78]

Q. And did you have a conversation with them about the building and about anything else pertaining to the building, or why you had come there?

A. That wasn't why we came there, no; we came there because—I have a birthday on the 16th of November, Mrs. Turnbeaugh has one on the 17th of November, and we had planned, as we had all the previous years, to have some kind of a party, either a dinner party or a card party or something. And the week before we had discussed where we would have this party, and so we didn't decide on anything definite, and we said we would drive over in the middle of the week and decide it. So that was why we happened to go on Thursday evening, November 14th.

Q. Thursday evening, November 14th. And you discussed, I presume, your birthday party?

A. Our birthday party, and decided that they would come to Riverbank because they were not very well settled there in the garage.

Q. And did they come?

A. Yes, they did.

Q. And that was the following Sunday, was it, or Saturday?

A. Saturday night.

(Testimony of Florence McGirk.)

Q. Saturday night? A. My birthday.

Q. I see. Now, what did you observe with reference to the furniture in the garage? It is quite awhile to remember.

A. All I remember was we were quite surprised that they were there that soon. They had purchased a bedroom set, they said, in Modesto—I don't know where they got it, but anyhow it was there. It had been set up that day, they said, and I think there was some kind of a stove, but I don't know what kind.

Q. A coal oil or wood?

A. I don't remember. [79]

Q. You don't remember. Did they have lights there, on? I presume it was about dark that time of evening?

A. They didn't have the electric lights.

Q. Did they have any lights there?

A. They had some kind of a coal oil light, but I don't know what type of light. But I know it wasn't electricity.

Q. Now, did you have a conversation with them about living there at that time?

Mr. Snyder: Purely a self-serving declaration.

Mr. O'Reilly: Very well.

The Witness: Pardon me?

Mr. O'Reilly: Does the court sustain the objection?

Mr. Brown: No objection, Your Honor.

Mr. Snyder: I will withdraw it.

(Testimony of Florence McGirk.)

Mr. O'Reilly: Q: Did you have a conversation with them about living there in those quarters at the time?

A. Well, all that I remember was that they told us the previous week that they intended to start building as soon as possible, and that we were a little surprised that they were living there that soon. That is all I remember about it.

Q. That is all you remember.

Mr. O'Reilly: I believe that is all.

Cross Examination

By Mr. Brown: Q. Mrs. McGirk, are you related to Mr. or Mrs. Turnbeaugh:

A. No, I am not.

Q. I understand that you lived at the same place they lived in three different cities?

A. Yes, we have.

Q. Is that what you said? A. Yes, I did.

Q. Pardon me for asking this, but there is no other way of [80] knowing: are you a widow?

A. No, I am not.

Q. And what does your husband do?

A. Right now he is working for Pollock, in the shipyards.

Q. What was he doing?

A. He was in the oil construction work at that time.

Q. And what was Mr. Turnbeaugh doing?

A. Doing then?

Q. Yes. A. Painting.

(Testimony of Florence McGirk.)

Q. And did Mr Turnbeaugh and Mr. McGirk ever work together?

A. No, I don't believe so.

Q. Did your husband ever work for him?

A. No, not that I remember of.

Q. Has he ever worked for your husband?

A. No, I don't think so. Their work is two different things.

Q. And I understand when they lived—Where did they live down south?

A. They lived at Artesia.

Q. And you lived there?

A. We lived in Artesia and my husband was working in Santa Fe Springs in the oil wells.

Q. And then when they lived in the next place—where was that?

A. At Williams, I believe.

Q. Then you went to Williams? A. Yes.

Q. And when they moved to Escalon, you moved to Escalon? A. Yes, we moved to Escalon.

Q. What was that, accidentally or by design?

A. No, it was just accidentally.

Q. Every time they went to each one of these three places, you were there? [81]

A. When we were at Williams Mr. McGirk was working on a wildcat well in Williams, and Mr. Turnbeaugh came up there looking for paint work and found it was a very good field, and stayed. And then they moved to Escalon first, and then there was a wildcat, as you remember, out at Oakdale and my husband was on that well for some time.

(Testimony of Florence McGirk.)

Q. Well, it just so happens that over the past ten years, since 1929—that is fourteen years.

A. Yes.

Q. You have lived in the same place they have lived?

A. We have been close enough that we visited all those years, yes, sir.

A. All those years. Are you a creditor of Mr. Turnbeaugh?

A. Creditor?

Q. Yes. A. No, sir.

Q. Are they a creditor of yours? A. No.

Q. And you are not related?

A. Not related.

Q. Do you keep a diary, Mrs. McGirk?

A. No, I don't.

Q. Tell us what you saw the first time you went out to this place, this new place that was built. What was it, a shed?

A. I wouldn't call it a shed.

Q. What would you call it?

A. I thought it was quite a nice looking building for a garage.

Q. Who told you it was a garage?

A. Well, they said it was to be their garage when the house was finished.

Q. Did it have sliding doors on it?

A. I don't know whether a sliding door or up-lift. [82]

Q. Was it an uplift door?

A. I don't know.

Q. What kind of a door was it?

(Testimony of Florence McGirk.)

A. There was a door that opened into another room, as I remember.

Q. There was a door that opened into a room. Where, if you were going to bring a car in, would you bring it in that place?

A. Well, there is a garage door there, yes.

Q. What kind of a door?

A. I said I don't know.

Q. Did you see the door?

Mr. O'Reilly: Just a minute. She said she didn't know what kind of a door.

Mr. Brown: Q. You were there?

A. Yes, I was there.

Q. Tell us what you saw.

A. Well, there is another door, as I remember, that comes in from the kitchen that we used, I believe.

Q. They couldn't get a car through that, could they? A. No.

Q. Well, where would you get the car through to put it in the garage?

Mr. O'Reilly: Just a minute, if the Court please. All this is argumentative, and we object upon that ground.

Mr. Brown: No.

Mr. Brown: Q. Where would you get a car in?

The Referee: Apparently the garage has two doors, one door in the kitchen-to-be and the——

The Witness: The other was the garage door.

The Referee (Continuing): ——garage door for the car to go in. I don't know as that is material.

(Testimony of Florence McGirk.)

Mr. Brown: I beg your pardon—it is my fault—did Your [83] Honor rule on the objection?

The Referee: Well, I don't really think it is material.

Mr. Brown: Q. Then how many windows were there in the garage?

A. I believe there are three.

Q. Well, were there three or four?

A. I said I believe there are three.

Q. Are you sure? A. I am not sure.

Q. What kind of a roof did it have on?

A. Well, it had shingled roof.

Q. Wood shingles or composition shingles?

A. Well, I don't know what construction; I wouldn't know.

Q. What color were the shingles?

A. Well, I guess they are wood color when they are new.

Q. Well, were they? A. Why, of course.

Q. Well, is that what these were?

A. Yes.

Q. And you are certain of that, Mrs. McGirk?

A. Yes.

Q. And what color were the walls on the inside?

A. Well, just plain walls.

Q. What do you mean by plain walls?

A. I mean there was no finished walls.

Q. Was it wood or plaster? A. Wood.

Q. And were the two-by-fours sticking out inside?

(Testimony of Florence McGirk.)

A. I don't know whether two-by-fours, but some kind of beams sticking out.

Q. Were there any coverings, or ply board over them? A. No. [84]

Q. Just bare walls, then?

A. Just bare walls.

Q. What kind of a floor did they have?

A. Cement.

Q. Cement floor. Do you remember the color of the cement? A. Well, cement color.

Q. And that is a gray, you mean?

A. Yes.

Q. It wasn't a red floor?

A. No, it wasn't a red floor.

Q. And then how was the inside of the room: did it have a square ceiling or did it have a gabled ceiling, if you know, a pointed ceiling?

A. I have never known what is a gabled ceiling. If you will explain it, I will try to answer you.

Q. Well, what kind of a roof did it have on, a shed roof or did it have a peaked roof?

A. Well, I think it has a peaked roof, this way, and a peaked roof, the other way.

Q. Oh, it was a sort of a square, peaked roof?

A. I believe that is the way it is.

Q. And what was the size of the room, Mrs. McGirk? A. The size?

Q. Yes, about.

A. Oh, it was a very large room.

Q. Big enough for about six cars?

A. Oh no.

(Testimony of Florence McGirk.)

Q. How many cars? A. Two, I should say.

Q. Two. Well, how big would you say it was?

A. I should think about thirty by eighteen.

Q. You have been in there a lot of times since, haven't you? [85]

A. Yes, I have.

Q. Several times? A. Yes.

Q. What else did you see besides the bed?

A. There was a highboy.

Q. A highboy?

A. And some type of a dresser, with a mirror on it.

Q. Some type of a dresser and a mirror. And I take it that you are a housewife and you take care of your own house so you understand the management of a house, don't you, Mrs. McGirk?

A. Fairly well, I believe.

Q. Would you say that the house had ever been lived in, when you first came there?

A. No, I don't think it had been; they told us they were sleeping there for the first time that night.

Q. As a matter of fact, the only thing you know is what they told you, isn't that right?

Mr. O'Reilly: Now, if the Court please, I think that is far-fetched. This witness has testified in a straightforward manner, and such remark of counsel is improper.

Mr. Brown: That is highly respectful, Your Honor.

(Testimony of Florence McGirk.)

The Referee: I think the question should be re-framed.

Mr. Brown: I have been very respectful here, if Your Honor please; that the only thing that she knows is what she has been told by these people.

Mr. O'Reilly: That is just as much as saying that this witness is perjuring herself.

Mr. Brown: No such thing.

The Referee: No; it is cross-examination. You have asked about the matter of their living or sleeping there, and apparently this witness doesn't know whether they were sleeping there. [86]

Mr. Brown: That is correct. That is the purpose of the question.

The Referee: Proceed.

Mr. Brown: Q. Now, Mrs. McGirk, you couldn't tell when you got there whether the house ever had been slept in, could you?

A. Why no, I couldn't.

Q. Of course you couldn't. And the only way you knew that they were going to sleep there was because somebody told you that, isn't that true?

A. Well, not exactly, because they had had their bed delivered and had made up the bed, they had their bedding there and were ready to sleep there.

Q. How many bedrooms have you?

A. Right now——

Mr. O'Reilly: If the Court please——

Mr. Brown: Withdraw that.

The Referee: Yes, I think so.

(Testimony of Florence McGirk.)

Mr. Brown: Q. You didn't see anybody sleeping in the house, did you?

A. No, I didn't.

Q. You never saw anybody sleep in that room, did you? A. Oh yes, I did.

Q. You mean long afterwards?

A. I have seen them sleeping there, yes.

Q. Lately, you mean?

A. No, not lately.

Q. Well, when did you first see anybody in bed in that house?

A. I couldn't say about that, but I have seen people in bed in that house.

Q. Just about when?

A. I don't know about that, but it was before they moved into the other house; it would be, I should think, in November, at [87] least, of that year.

Q. In November of that year you saw people sleep there? A. Yes.

Q. Who did you see sleeping there?

A. Well, her little girls had the flu one time, we were over there—that I recollect particularly, about that—they were in bed there.

Q. When did they give up the Gagas house?

A. I don't know that.

Q. When did you see them last in the Gagas house?

A. I don't think that we were ever over there again.

Q. You were never over there again?

(Testimony of Florence McGirk.)

A. No, I don't believe so.

Q. Do you know when they moved away from the Gagas house?

A. I know about when they moved away.

Q. When?

A. I should say the early part of 1941.

Q. The month of January, February, March or April?

A. I should think the latter part of January.

Q. The latter part of January. Are you sure of that? A. Well, I am quite sure.

Q. Now, Mrs. McGirk, this is intended in the highest respect, so don't take this as a personal issue, this is purely a legal matter; what toilet facilities were in this garage that you saw?

A. There was a toilet in the garage. I don't think it was there the first time I was there, though.

Q. When did you first see the toilet in the garage?

A. Well, during some of our next visits there, but I don't know just whether I can give you the dates.

Q. Was it after or before February of 1941?

A. I couldn't say.

Q. And you didn't see one there the first time? [88]

A. No, I don't think it was there the first time.

Q. Did you see any pots or pans or dishes the first time you were there?

A. We were only in this part where the bed was, and I don't—All I remember is the bed and

(Testimony of Florence McGirk.)

the stove and the things that I have mentioned.

Q. At that time was there or was there not any water connections in the place?

A. I didn't see any; I don't know.

Q. Were there any toilet facilities there at that time?

A. I don't know. We were only there about an hour that evening.

Mr. Brown: That is all, Your Honor.

The Referee: Well, the court would like to ask a few questions.

Mr. Brown: Yes.

The Referee: Q. You say you saw the little girls in bed? A. Yes.

Q. With the flu?

A. Well, they were sick; I don't know whether it was the flu or not.

Q. Well, were they in bed?

A. Yes, they were.

Q. And about when was that?

A. Well, I would say the latter part of November.

Q. You mean November of 1940? A. Yes.

Q. Just shortly after you were there?

A. Yes; yes.

Q. Let me ask you this: How close was this garage to a highway?

A. Well, I don't know whether you call the street in front of the house the highway, or the 99 Highway. There is a street in [89] front of the house.

(Testimony of Florence McGirk.)

Q. A street in front of the house. I see.

A. It is called Murphys Ferry Road, I believe.

Q. Is that a street or a road, county road?

A. I think it is a county road.

Q. County road. And how far is it from that to the garage, the place that you went to on that night?

A. Oh, I suppose it sets back 60 or 70 feet.

Q. Did you drive in? A. Yes, we drove in.

Q. Was there any graveled drive?

A. Well, that is very sandy soil in there. No, I don't think so.

Q. What kind of a night was it?

A. It was clear; it wasn't a rainy night.

Q. A clear night? A. Yes.

Q. No rain? A. I don't believe so.

Q. No fog?

A. Probably; might have been a fog, but I don't remember about that.

Mr. O'Reilly: Are you through, Your Honor?

The Referee: Yes.

Mr. O'Reilly: That is all, Mrs. McGirk. Thank you.

Mr. Brown: Your Honor, May I, with Your Honor's permission, admonish the witnesses who testified not to discuss the matter with any other witness? I mean, this happens to be important.

The Referee: Yes, it may be so ordered.

MRS. CLARICE THIEMANN

called and sworn as a witness on behalf of the Bankrupts, [90] testified as follows:

The Referee: And what is your name, please?

A. Clarice Thiemann, T-h-i-e-m-a-n-n.

Mr. O'Reilly: Q. Where do you live Mrs. Thiemann?

A. I live in Ripon, on the Murphy Ferry Road.

Q. And do you know Mr. and Mrs. Turnbeaugh?

A. I do.

Q. And do you know where they live at the present time? A. They are neighbors of mine.

Q. They are neighbors of yours. When you say they are neighbors of yours, you mean that the house they are now living in? A. Yes.

Q. How far from the house that they are now living in do you live?

A. I live—they are the third acre from us.

Q. Third acre. Well, in feet, how many feet would that be? A. It is about 400 feet.

Q. About 400 feet? A. Yes.

Q. Any obstructions between your house and their house? A. There is now.

Q. Was there then?

A. No. When they built there was nothing.

Q. Now had you known the Turnbeaugh's prior to November 14th, 1940?

A. I didn't know Mr. and Mrs.; I knew the boys. But I didn't know who they were until I saw them start to build.

(Testimony of Mrs. Clarice Thiemann.)

Q. What was the first thing that you saw on the place that occurred to you that they were building?

A. Well, a tent went up and some lumber was brought.

Q. Do you know on what date the tent went up, approximately?

A. It was before the first of November; the latter part of [91] October.

Q. The latter part of October?

A. Yes.

Q. And I believe you stated that up to that time that you hadn't known them?

A. No, I didn't know them.

Q. Or were you acquainted with any of the Turnbeaugh family? A. No.

Q. That is, on speaking terms with them?

A. No.

Q. Now, did you observe the building of the garage? A. I did.

Q. And prior to that time there was nothing on the property except these tents and the lumber that you speak of? A. Yes.

Q. Do you know, Mrs. Thiemann, approximately the date of the building of that garage?

Mr. Snyder: You mean the completion, John?

Mr. O'Reilly: Q. The date when they started to begin.

A. It must have been about the first of November, because that was when we had built, a year

(Testimony of Mrs. Clarice Thiemann.)

previous, and I thought they were very foolish to build so late, because I know we were.

Q. Now, do you know on or about what date the garage was completed? I am not holding you down to any specific date unless you know, Mrs. Thiemann.

A. When it was actually completed? It must have been shortly after Thanksgiving — I mean, Armistice Day.

Q. Well, how do you place that date?

A. Well, during November—I know before Thanksgiving there used to be lights in there, and a car; they must have been living there, and it must have been finished. I know the tent wasn't up very long. And it was cold then, and they were in there. [92]

Q. Well, did you visit them in their garage quarters?

A. I did the latter part of November. I collect for the Red Cross roll call, and it begins after Armistice Day.

Q. Did you visit them on that occasion?

A. I called at the door and she invited me in, but I was collecting, and her husband wasn't there and she had no money for me, and I went on.

Q. Did you observe the condition of the garage?

A. Well, it looked very crowded; I felt embarrassed to go in, to accept the invitation.

Q. Well, you say it was crowded. In what manner?

(Testimony of Mrs. Clarice Thiemann.)

A. Well, the furniture in there. They were living in there.

Q. Was there a bed there?

A. Well, I wouldn't swear exactly there was a bed; you glance in at a door. It was full of furniture.

Q. Now, prior to that time that you say you went there for the purpose of collecting for the Red Cross, did you observe any lights there evenings?

A. Yes, my breakfast nook had no shades on it at the time and our one window faces north and one faces east, which was their direction, and I could see lights there in the evening when we were eating. They had one window, small window. And in the morning, why, sometimes there would be a light; it was dark at seven o'clock in the morning. And there was a car there.

Q. Now, before that, prior to that time did you observe the boys or any of the family living in the tent?

Mr. Snyder: Let's get some times fixed. We object to it upon the ground it is indefinite.

Mr. O'Reilly: Well, she said that she believed the tent was there.

Mr. O'Reilly: Q. On what date, about what time?

A. It must have been around October 26th or so. During the [93] last week.

Q. Well, between October 26th and in November, well, we will say Armistice Day, which usually

(Testimony of Mrs. Clarice Thiemann.)

falls on the 11th, did you observe any members of the family living there in the tent?

A. Yes, I knew there was some. The boys were in the tent, because I have a boy and he wanders around and he knew that they were there, someone was there.

Mr. Snyder: Just a second. That would be obviously hearsay.

Mr. O'Reilly: That may go out, of course.

The Referee: It may stand out.

A. They had lumber there, and when we built we had windows stolen from our house, and the other neighbors had lumber taken from their place, and I just figured that they were guarding the lumber was why they were living there.

Mr. Snyder: We ask that go out.

The Referee: It may stand out.

Mr. O'Reilly: Q. Did you observe them in or around the tent in the daytime or evening?

A. The boys used to be there real early in the morning. They went to school, though.

Q. Did you observe any lights in the tent?

A. Yes, they had some lights in the tent.

Q. They did.

Mr. O'Reilly: You may cross-examine.

Cross-Examination

By Mr. Snyder: Q. You can't recall any of these dates particularly, can you, Mrs. Thiemann?

A. Well, I can November 1st, because that is when we built, a year previous.

(Testimony of Mrs. Clarice Thiemann.)

Q. And because you built a year previous you feel that they were building at about the same time? [94]

A. They were building—yes, they had started at the same time.

Q. And merely because you built then your recollection is refreshed by that fact, is that correct?

A. Yes.

Q. Now, Mrs. Thiemann, once you mentioned that you went around Thanksgiving, and the next time you said around Armistice Day. Do you recall when it was that you went over there?

A. For the roll call?

Q. Yes, Red Cross.

A. Well, the roll call begins after November 11th, and so it was between then and the end of November that I went.

Q. You can't give us any date more definitely than that?

A. No, because when you have four or five miles to go, you take time out when you have it.

Q. In other words, you don't want us to believe that these things you are testifying to existed there on November 14th or 15th, do you?

A. Well, it could have; I have no definite—

Q. But you are not so testifying, are you? In other words, you don't know, do you?

Mr. O'Reilly: Just a minute now. I think, if the court please, she has been explicit.

The Referee: Well, this is cross-examination.

(Testimony of Mrs. Clarice Thiemann.)

Mr. O'Reilly: The question is: "Do you want us to believe"?

The Referee: Well, it is not necessary to have any argument. Counsel is entitled to ask the question; let him ask it.

Mr. Snyder: Q. How long did it take them to build the garage?

A. I would say about three weeks.

Q. About three weeks? [95] A. Yes.

Q. Did you see them doing the work about the place? A. Yes.

Q. Was it just Mr. Turnbeaugh or did the boys work with him?

A. Well, it was Mr. and Mrs., and a few days there were other people there. But I noticed her in particular.

Q. Working about the place?

A. Yes.

Q. Now, these lights that you saw: Could you tell whether they were electric lights or not?

A. No.

Q. You don't know.

A. Yes, it wasn't electric lights; it wasn't bright enough.

Q. Wasn't an electric light? A. No.

Q. Do you remember when they lived at Gagas'? Do you live on that same side from where they live now? A. Yes.

Q. Do you remember when they lived in Gagas'?

A. Well, Gagas' is around the corner. We can't see them, but I knew.

(Testimony of Mrs. Clarice Thiemann.)

Q. Mr. Turnbeaugh said that they lived there until about February of 1941. Would you, from your watching them, say that they moved out of Gagas' around February of 1941?

A. Well, I think the children came, the small girls came about then. But I took it for granted that Mr. and Mrs. were living there all the time.

Q. But you don't know. In other words, what I am asking for, you recall the children living on the premises around February, 1941?

A. That the small children came there all the time. Naturally they had been there during the day-time, and then they seemed to [96] disappear.

Q. Mrs. Thiemann, have you discussed this with anyone at all?

A. What do you mean? With my husband.

Q. Your testimony here in court?

A. With my husband.

Q. These dates and things. With no one else but your husband? A. That is all.

Q. No one else at all? A. No.

Q. How did you happen to come up here today, did Mr. and Mrs. Turnbeaugh ask you to come?

A. Mr. Turnbeaugh asked my husband, and he asked me. Mr. Turnbeaugh has never asked me.

Q. And your husband and you discussed this, these dates, is that correct? A. Yes.

Q. When did you have this discussion?

A. Oh, it must have been about a week ago, I guess.

(Testimony of Mrs. Clarice Thiemann.)

Q. And what was that discussion that you and your husband had?

A. Well, he asked me if I remembered them building.

Q. Yes.

A. And I said yes it was the same time that we had started to build, and I thought they were crazy.

Q. Do you remember when their house was finished?

A. Well, that must have been around in July.

Q. In July?

A. The house went up between, and they were finished May 31st, and Turnbeaugh's didn't move into the house until after that, not into their house.

Q. Do you remember when they started to build their house?

A. I think it was around in January.

Q. In January? [97]

A. That they laid the foundation.

Q. Now, you say you went up to this door and knocked? A. Yes.

Q. Do you remember which way the door opened, did it open into the garage or out from the garage?

A. It opened this way.

Q. Would that be into the garage?

A. Out.

Q. Out. And did you get a clear view of all the inside of the garage?

A. I did over that way. (Indicating.)

Q. That would be——

(Testimony of Mrs. Clarice Thiemann.)

A. One side of the door was closed. It was a double door and one side was closed.

Q. It was a double sliding door?

A. No, it was a door that opens out—two doors that open out.

Q. Oh, it wasn't the door that cars go into?

A. Yes.

Q. It was the big door?

A. Well, it is two doors that open this way.

Q. But it was the entrance where the car would go in, is that right? A. Yes.

Q. Did you see any electric range in there then?

A. No.

Q. You don't recall seeing an electric range?

A. No.

Q. Would you say it was not there?

A. No, I wouldn't say that, either. I didn't see.

Q. You didn't see.

A. I saw what looked like chairs and maybe a bed and furniture, more of that type. [98]

Q. You are not sure about the bed?

Q. Well, I would almost swear it was a bed, but I——

Q. Did you see a pressure system in there, a tank for a pressure system?

A. I think the pressure system is on the outside.

Q. Was it there at that time? A. No.

Q. It was there later?

(Testimony of Mrs. Clarice Thiemann.)

A. Uh-huh. They had to build an addition to put that in.

Q. Now, this bed, could you describe it to us at all? A. No.

Q. You can't describe it to us? A. No.

Q. And outside of the bed, the only things you recall are some chairs?

A. I think there was a chesterfield.

Q. You think there was a chesterfield?

A. Yes. I glanced in. I didn't stand and look.

Q. I appreciate that.

A. As she opened the door, she invited me, and I glanced in, you see a crowded room and——

Q. Did you see any stove of any sort?

A. Well, when I glanced in, I didn't picture what was there; I just saw it was crowded with furniture.

Q. Did you see any lumber piled up?

A. Not inside.

Q. Was there some lumber piled outside?

A. Well, I think there was only a few scraps left from building the garage.

Q. Just a few scraps.

Mr. Snyder: That is all.

Mr. O'Reilly: That is all. [99]

CLEM V. MULHOLLAND,

called and sworn as a witness on behalf of the Bankrupts, testified as follows:

The Referee: And what is your full name?

A. Clem V. Mulholland. C-l-e-m.

Mr. O'Reilly: Q. Mrs. Mulholland, do you know the Turnbeaugh's? A. Yes, sir.

Q. Where do you reside, Mrs. Mulholland?

A. In Ripon, sir.

Q. In Ripon?

A. Yes. Well, it is not in town, it is on a little road outside of Ripon.

Q. And where did you reside on or about the 14th of November, 1940? A. Same place.

Q. Same place. Did you know the Turnbeaugh's at that time? A. Yes, sir.

Q. How long have you known them?

A. About four years.

Q. About four years? A. Yes.

Q. Now, did you visit their house at any time?

A. Yes, a number of times.

Q. Did you visit with them when they were living in the house at Ripon?

A. You mean—which house?

Q. The Gagas.

A. That's right, yes, sir, I did.

Q. You did? A. Yes.

Q. And did you subsequently visit with them in their garage [100] quarters?

A. I had occasion to go there.

(Testimony of Clem V. Mulholland.)

Q. In what year? A. In the year 1940.

Q. 1940. Do you know the month?

A. It was about this time of the year; in November. A little earlier than this.

Q. A little earlier than——

A. This is December. This is December, isn't it? Yes. It was in November.

Q. On what day in November did you first visit the Turnbeaugh's in 1940, if you know?

A. The first day? Well, I couldn't say exactly the first day, but I was there a number of times.

Q. Well, let me ask you this: Were you there at any time during the time that a garage was being built? A. Yes, sir.

Q. And were you there after it was built and completed? A. Yes, sir.

Q. Now, when is the first time that you visited the Turnbeaugh's during the time that the garage was being built?

A. Well, the first time was at night; I had occasion to go there to deliver a message to him to come to the telephone. It was, I imagine about 9:00 o'clock.

Q. In the evening? A. In the evening.

Q. Can you approximately fix the date or the day of it?

A. Well, it was before Thanksgiving of that year, and that was the new—so-called new Thanksgiving, which would have been the third Thursday in November, and it was prior to that.

Q. How many days prior was it?

(Testimony of Clem V. Mulholland.)

A. Well, it was over a week. [101]

Q. Over a week prior to that?

A. About a week before that, yes, sir.

Q. I don't know what that Thanksgiving was on that year; on the 23rd, wasn't it?

A. No, I think it was the 21st.

Q. Twenty-first?

A. I'll have to look at a calendar. It was not the old original Thanksgiving; it was the so-called new Thanksgiving, the third Thursday.

Q. And you say on the occasion of your going there at that time you delivered a telephone message?

A. To call Mr. Turnbeaugh to the telephone. He often gave our number; in fact, the call was from his son, and his son always calls our number to get him.

Q. Now, who was there when you visited them or went there?

A. Mrs. Turnbeaugh was there.

Q. And what were they doing, if anything?

A. Well, I guess they were in bed; it was dark.

Mr. Brown: Now, we ask that that go out, if Your Honor please, on the ground——

The Witness: It was dark. I mean, they were in the building because I had to knock on the door. I tooted the horn and Mr. Turnbeaugh turned on the light, some sort of a lamp; I presume it wasn't a very good lamp from what I could gather, and I told him that they were wanted on the phone. So then I went back home, and then, or, in 15 or

(Testimony of Clem V. Mulholland.)

20 minutes he came to talk. I told the operator it would take about 20 minutes to get them. That is about the length of time. I don't know how far it is from there; it is a mile, I guess, or a mile and a half.

Q. Did Mr. Turnbeaugh talk to you at that time? A. Yes, sir.

Q. And did he say that he would come? [102]

A. As soon as he got dressed. They were in bed. The light was out and they had to light a light, and he said as soon as he got dressed he would come to the phone.

Q. Now, you say you visited with them or went there on a similar purpose at a later date?

A. Oh, I went there a number of times.

Q. Oh, you did. Did you at any time go inside the garage quarters during the year 1940?

A. Yes.

Q. During the month of November?

A. Yes.

Q. Can you place the date?

A. Oh, I couldn't place the exact date.

Q. Well, how soon after the first time that you went there, that you called there for Mr. Turnbeaugh?

A. Well, I had been there a number of times before the phone call; I had occasion to go by that road and while the garage was being built I was there, when they were laying—they had a cement floor in it. I stopped there a number of times.

(Testimony of Clem V. Mulholland.)

Q. When was the first time, approximately, that you were inside of the garage?

Mr. Brown: She has already testified that she doesn't know the date.

The Witness: Not the exact date, but it was in the month of November. And the phone call that particular night—now, I wasn't in the building, you understand, that night; I knocked on the door and they answered.

Mr. O'Reilly: Q. That's right.

A. Mr. Turnbeaugh answered me.

Q. Now, the next time you were in the garage, then what did you observe with reference to the garage and furnishings on the inside? [103]

A. They *had bed*.

Mr. Brown: When, that is what time, if the Court please? The next time from when?

Mr. O'Reilly: Is this the first time you were there, after the phone call?

A. First time after the phone call.

Q. That you are now talking about, that you went inside?

A. There could have been another phone call in between there.

Q. I am asking you, Mrs. Mulholland, when was the first time that you were on the inside?

A. If I got the first phone call the week before Thanksgiving it must have been Thanksgiving week then that I was in the building.

Q. All right. Now, what did you observe when you were there on that occasion?

(Testimony of Clem V. Mulholland.)

A. Well, there was a bed there and they had a sort of a rug or something over their cement floors. It was built for a garage, and there was a cement floor on it.

Q. Yes.

A. And some kind of a stove, heating apparatus; but they had no electricity, they had a coal oil lamp.

Q. Now, before this phone call that you have testified to, did you observe any other buildings or structures on the lot?

A. Before? Well, it was sort of a little lean-to, as I remember it, against that garage. I think they build a lean-to first, or the boys had a tent there.

Q. That is what I am trying to get at: was there a tent there? A. A tent was made first.

Q. Did you see anybody in and around that tent, or living there?

A. Well, they told me that the boys had lived there.

Q. Just a second.

Mr. O'Reilly: That may go out. [104]

The Witness: No, I couldn't say that I saw the boys in the tent.

Mr. O'Reilly: All you saw was the tent?

A. Yes, the tent was there. I was never there when the boys were in it, really.

Mr. O'Reilly: I believe that is all.

(Testimony of Clem V. Mulholland.)

Cross Examination

By Mr. Brown: Q. Mrs. Mulholland, outside of raising six daughters and running a sales yard and two or three other businesses, do you have a record of all the phone calls that you answer down there?

A. Mr. Brown, I did have, but unfortunately they were burned.

Q. The records are burned?

A. The telephone bills.

Q. You were in the habit——

A. For two years.

Mr. O'Reilly: Let her complete.

A. For two years, Mr. Brown, I attempt to keep them, and I have a record of a year ago, and I was confident I had had the two years records, but I couldn't find them.

Mr. Brown: Q. But these records are gone?

A. They are.

Q. I see. A. But the phone call was placed.

Q. But you are still raising six daughters?

A. Yes.

Q. And still running the sales yard?

A. Yes.

Q. And you are still a very busy lady?

A. Yes; but I still take messages for the neighbors.

Q. You still take messages for the neighbors. And you have a little red book there, as I remember, that you hang on the wall, [105] alongside of the telephone; whenever you get a call you write it in that book? A. No, sir.

(Testimony of Clem V. Mulholland.)

Q. What is the color of the book that you have got?
A. There is no book.

Q. There is no book. All right. Now, do you really know, Mrs. Mulholland, the date that you got that first phone call to the Turnbeaugh's?

A. Well, Mr. Brown, I am confident, I am positive it was before that Thanksgiving.

Q. Now, which Thanksgiving?

A. The third Thursday in November, which was the Thanksgiving of two years ago.

Q. Are you confident that that is the Thanksgiving Day two years ago?

A. That was the date, yes, sir.

Q. Two years ago?

A. Two years ago. They moved Thanksgiving up.

Q. Well——

Mr. O'Reilly: Just a minute, let her finish her answer, Mr. Brown, please.

A. You see, they moved Thanksgiving up one week, you understand that.

Mr. Brown: Q. I think I do.

A. I think so.

Q. And then you had the phone call?

A. Yes, sir.

Q. And the day of the month that was, you don't know. Of course, you don't know.

A. Basing it on the Thanksgiving, which I have one particular item that I do recall definitely—the Saturday after that Thanksgiving. [106]

Q. You remember that call?

(Testimony of Clem V. Mulholland.)

A. No, no, I remember something pertaining to that. Would you want me to tell you?

Mr. O'Reilly: Yes, you tell him.

Mr. Brown: Q. Yes, you tell anything.

A. I stopped at Turnbeaugh's house——

Q. The Saturday after Thanksgiving?

A. That's right. And Mrs. Turnbeaugh's people——

Q. That is what you do remember, isn't it?

Mr. O'Reilly: If the court please, I object to Mr. Brown interfering with the witness; let her tell her story.

The Referee: Well, let's have it by question and answer.

Mr. O'Reilly: He is interrupting, I meant to say.

The Referee: Has there been any question?

Mr. Brown: Q. The first time you remember, Mrs. Mulholland, is the Saturday after the Thanksgiving, isn't that right?

A. No, I remember the other.

Q. Well, how many days was it before that time? A. It was a week.

Q. How do you know that it was a week?

A. Well, I know it was before that Thanksgiving, Mr. Brown.

Q. Well, how do you know how long it was before?

A. Well, it was not too far because I discussed that call.

(Testimony of Clem V. Mulholland.)

Q. How do you know it wasn't four days before Thanksgiving?

A. It was before Thanksgiving.

Q. Well, you are guessing, aren't you, Mrs. Mulholland?

A. No, sir.

Q. You are not guessing?

A. No. [107]

Q. Do you know what day it was?

A. Yes.

Q. Well, just exactly how many days before Thanksgiving was it that you got a call?

A. A week.

Q. Seven days?

A. Yes.

Q. And what time of the day was it?

A. It was about nine o'clock at night.

Q. You are a friend of Turnbeaugh's, aren't you?

A. Just merely—they were neighbors at one time.

Q. And you are still very friendly?

A. Not too friendly.

Q. You are trying to help the Turnbeaugh's, aren't you, Mrs. Mulholland?

A. Not any more than I would help anyone else.

Q. But you don't really and truly know the exact time that it was that you first got that phone call, do you?

A. It was previous to Thanksgiving.

Q. How long, you don't know?

A. Not over a week.

Q. Not over a week?

A. No.

(Testimony of Clem V. Mulholland.)

Q. Well, how much under a week was it?

A. Well, I don't think it was under a week. I am basing it that it was that Friday night after the sale, because I hadn't yet gone to bed, and I usually go to bed before that time, and that call was around 9:00 o'clock, and I would have been up on a Friday night.

Q. And where were they living at that time, where was their principal place of residence?

A. Their principal place was about a mile and a half or maybe [108] two up the road, I don't know.

Q. Well, which was their principal home?

A. Where their youngsters were and where they had rented for so many months.

Q. Was that known as the Gagas house?

A. That's right.

Q. And that is where they lived?

A. And that is where they—and I supposed they were there, I went there first.

Q. You went there?

A. I went there first.

Q. And who told you to go to the other place?

A. The boy, Harley; went to the door and he said "The folks are staying down at the other place."

Q. He told you that?

A. He told me that. And then I go to the other place, which was nearer to Ripon.

Q. Then did you go into the other place?

A. I tooted the horn and then made a racket

(Testimony of Clem V. Mulholland.)

so that they could hear me, because it was all dark around there.

Q. And you went in. And what did you see? What did you see when you got there?

A. I didn't see anything; it was 9:00 o'clock at night, it was dark.

Q. It was all dark? A. It was all dark.

Q. There were no lights? A. No lights.

Q. And you tooted your horn?

A. That's right.

Q. And after you tooted your horn what happened?

A. Mrs. Turnbeaugh hollered and asked who it was. [109]

Q. And you told her "Clem Mulholland"?

A. I said, "There is a phone call for Mr. Turnbeaugh." It wasn't a message, it was a person-to-person; he had to come answer it.

Q. They shouted from the inside, "We're in bed, we can't come out," is that it?

A. "As soon as I get up and get dressed, I'll come over."

Q. Do you remember those words?

A. Words to that effect.

Q. Just those exact words? A. No.

Q. Aren't you guessing these things, Mrs. Mulholland? A. No.

Q. Did they say "When we get dressed"?

A. "As soon as he gets up."

Q. As soon as he gets up. A. Yes.

(Testimony of Clem V. Mulholland.)

Q. You remember those literal words?

A. Well, to that effect.

Q. What do you mean, to that effect?

A. That he meant as soon as he got up he would answer the phone.

Q. What did he say that made you believe that?

A. Why, I naturally went home and turned on the light for him to come over to take the message.

Q. Then you drove on? A. I went home.

Q. And they didn't use those words at all, did they?

A. I can't say what words they used, Mr. Brown. He said he would come there to answer the phone.

Q. He said he would come there to answer the phone? A. Yes.

Q. Did he tell you whether he would come from the other house or this house? [110]

A. No, he wasn't at the other house.

Q. Did he answer you, or did she answer you?

A. Well, he must have been there; she couldn't have walked to the other house.

Q. Who answered you?

A. She answered me.

Q. Did he answer you?

A. Well, I wouldn't swear to that.

Q. Well, was he there or wasn't he there?

A. Well, I had every reason to think he was there; she said as soon as he got dressed.

Q. Did you see him there? A. No.

Q. Did he talk to you from in there?

A. No.

(Testimony of Clem V. Mulholland.)

Q. Then you are guessing that he was in there, aren't you?

A. I am supposing that he was there.

Q. You are supposing. And you are supposing that you went there at that time, aren't you?

A. No, sir, I am not; I am definitely positive.

Q. You know you went there?

A. I am certain of it.

Q. But you don't know when you went there?

A. I went there the week before Thanksgiving.

The Referee: Q. Where was that call from?

A. That call was from Oakland.

Q. Oakland?

A. And when I started——

The Referee: Well, that is a matter of proof.

Mr. O'Reilly: What did you start to prove?

The Referee: The telephone company would have a record of that. [111]

Mr. Brown: Yes, they will have.

The Referee: No use taking up a lot of time.

Mr. Brown: Q. Was it a collect call or a pre-paid call?

A. Usually, that particular son, sent them collect.

Q. Well, was that call a collect call?

A. I haven't been able to find that out. If there was a collect call it would be charged to our account; if it was a pay phone down there they would have no record of it in **Ripon**.

Q. Thank you. That is important, whether it is collect or prepaid.

(Testimony of Clem V. Mulholland.)

A. It is, Nat—Or Mr. Brown.

Q. Why don't you remember that?

A. Well, every other call the boy put in was collect; I guess that was, too.

Q. Well, was it or wasn't it?

A. I couldn't say.

Q. Are you guessing about it? A. No, sir.

Q. Now, when he came back, did he come over while you were there? A. Mr. Turnbeaugh?

Q. Yes. A. Yes, he did.

Q. And what did he say to this man?

A. As I recall it, it was about material. His son was——

Q. Who was he talking to? A. His son.

Q. His son. Now, tell us what he said to his son, two years ago.

A. I couldn't do that.

Q. Well, you can remember everything else.

A. Oh, no. [112]

Q. Why?

A. I can definitely remember of going out at night and driving two miles up the road to deliver a message.

Q. Were you there when he answered the phone?

A. Yes.

Q. Did you listen?

A. Not particularly, no.

Q. You were there, right there in the room, that little room?

A. It isn't a little room; it is my kitchen.

(Testimony of Clem V. Mulholland.)

Q. In your kitchen. And he came into the kitchen and you were in the kitchen?

A. That's right.

Q. Now, tell us what he said.

A. I don't remember, but it was pertaining to paint.

Q. You don't remember that as well as you remember the day, do you? A. Well——

Q. Do you, do you?

A. Yes, that it was about paint, because he was working for a paint company.

Q. What did he say about it?

A. Something about what material his father had ordered for a job, or something of the sort.

Q. Tell us what he said.

A. I can't tell you that.

Q. You have forgotten all about it?

A. No, I haven't forgotten all about it.

Q. Do you know anything about what he said?

Mr. O'Reilly: Just a minute. If the Court please, this is objected to as argumentative.

The Referee: Well, I think the witness has stated sufficiently. [113]

Mr. Brown: A very clever woman; she tells us what she knows.

Mr. Brown: Q. Now, do you remember anything about the conversation?

A. It was concerning material.

Q. How long did he talk?

A. Well, I guess ten or fifteen minutes.

Q. Ten or fifteen minutes?

(Testimony of Clem V. Mulholland.)

A. It was a lengthy conversation.

Q. What did he say in that conversation?

A. Well, it was all about material. I wouldn't know about that. Pertaining to gallons, I guess, and quantities.

Q. You guess? A. I guess.

Q. You guessed the whole thing, don't you?

A. No, I don't guess the whole thing.

Q. What? A. No, sir.

Cross-Examination

By Mr. Snyder: Q. About what time was it you got there?

A. What do you mean, Mr. *Brown*?

Q. When you went over to the house to call Mr. Turnbeaugh, about what time was it?

A. Well, I am placing the time about nine because the rate for long distance I think at that time started at 8:30, so the call was after 8:30.

Q. And there was, so far as you know, no light burning and you didn't see any strange cars around the place that would indicate to you that anyone else was there?

A. Not that particular night, no.

Q. Were there any cars around there at all?

A. Turnbeaugh's car was there. [114]

Q. That is all?

A. That is the only one that I noticed.

Q. That is a Mercury?

A. That was in the headlights—you know what I mean, outside of the headlights of my own machine.

(Testimony of Clem V. Mulholland.)

Mr. Snyder: That is all, Mr. Brown.

Further Cross-Examination

By Mr. Brown: Q. Aren't you influenced by your feelings in this matter, Mrs. Mulholland?

A. No.

Q. You are quite sympathetic with these people?

A. No.

Q. On account of your own predicament?

A. No.

Q. And you are not leaning their way purposely?

A. No.

Q. And you wouldn't do that?

A. No, sir. I know the boys and all of them, Santos' and all of them.

Redirect Examination

By Mr. Reilly: Q. You know Mrs. Santos?

A. I know Mrs. Santos and the boys. The youngsters went to school with some of my girls.

Q. I believe you started to explain and Mr. Brown apparently didn't allow you to, why you distinctly remember the date in question, about a week before the Thanksgiving Day.

A. Because the Saturday following that Thanksgiving I stopped in at the so-called Gagas house, and Mrs. Turnbeaugh's people were here from the south, Long Beach or some place else, and I was visiting there with her mother. They hadn't been up there in some time. And that was the Saturday after, and I know the call was before that; in fact, as I say, there were several calls. [115]

(Testimony of Clem V. Mulholland.)

Q. This sale that you mentioned awhile ago that you didn't complete, something about a sale.

A. Friday night I stated—I don't know what date that particular Friday night was—I think it was most likely on Friday night because I was still up, and I ordinarily am in bed before then.

Q. Do you know the young man that called by long distance? A. I have met him.

Q. Have you made any attempt to go over to the telephone company, Mrs. Hulholland, about the telephone bill?

A. I have. And Ripon stated that they are only required to keep their records six months. They had the year ago records, you see, but then they pile up on them and they have no storage place, so they told me they destroyed them. I made every effort to get them, because I was confident that it was collect and it would therefore show on my bill; otherwise there would be no way to trace it because if it was from a pay station, a little place like Ripon keeps no track of incoming calls. That is the truth, Nat.

Q. You know Mr. Brown very well?

A. Yes.

Q. In fact, you know Mr. Snyder, too?

A. Yes.

Q. And you are under subpoena now by Mr. Snyder in a case that is coming up next week?

A. Yes, sir, sometime.

Mr. O'Reilly: Well, that is all.

(Testimony of Clem V. Mulholland.)

Recross Examination

By Mr. Snyder: Q. When you say you visited them on the Saturday after Thanksgiving and Mrs. Turnbeaugh's mother was there, were they at the Gagas place? A. Yes.

Q. You talked to Mrs. Turnbeaugh, I guess over at the Gagas [116] place, then?

A. Uh-huh (Affirmative).

Q. She was there with the mother?

A. I think so.

Q. Did you have tea with them, or something?

A. No, no tea.

Q. Was it in the afternoon?

A. Well, to make it safe, between 11:00 and 1:00.

Q. 11:00 and 1:00. Did they have lunch there?

A. Their table was all set. As I recall it, they hadn't eaten yet.

Q. But Mrs. Turnbeaugh was there?

A. Mrs. Turnbeaugh was.

Q. Was Mr. Turnbeaugh there?

A. No, he wasn't.

Mr. Snyder: That is all.

Recross Examination

By Mr. Brown: Q. And while you were there, the house was running just the same as it always has. You were there many times, weren't you?

A. What do you mean by that?

Q. Well, you have been in that home many times? A. Not too many.

Q. Before that?

(Testimony of Clem V. Mulholland.)

A. No, no, sir, not very many.

Q. Never been there before?

A. I had been there at times. But their table was set.

Q. Yes. A. For lunch.

Q. That's right.

A. Mr. Turnbeaugh wasn't there.

Q. Yes. [117]

A. I believe one of the boys was, and the two little girls were.

Q. They were all home? A. Yes.

Q. Now, you remember that home how you saw it furnished the first time? You remember that, the first time you were there?

A. Well, you are talking about two different homes.

Q. No, the Gagas home.

A. Yes, the Gagas home.

Q. The Turnbeaugh home at the Gagas house?

A. That's right.

Q. Do you remember the first time how the house was furnished? A. Yes.

Q. And the time you are referring to now, it was furnished identically the same way?

A. I was only in the living room.

Q. The living room? A. Yes.

Q. You could see the rest of the house?

A. No, sir.

Q. The living room was furnished just the same as it had been previously?

A. And the dining room was adjoining.

(Testimony of Clem V. Mulholland.)

Q. Furnished just the same as it always was?

A. Yes.

Q. When was that?

A. This Saturday after Thanksgiving.

Q. That is the date you were there?

A. That's right.

(Reporter's Note: At this time the reporter replenished the supply of stenotype paper in his machine, and a discussion was had off the record, after which the following proceedings were had:) [118]

Mr. O'Reilly: They intended to make that their home and were actually residing there, and were intending to make it their home, which the evidence establishes that they did, and that is a homestead and a compliance with the Homestead Law.

Mr. Brown: That is by Judge O'Reilly.

Mr. O'Reilly: I will quote the law on this.

The Referee: So far as the evidence is concerned, you don't need to bring any further witnesses that saw them in there.

Mr. Snyder: And that they slept there.

The Referee: And that they slept there.

Mr. O'Reilly: Then, as I understand it, the court is convinced at this time that Mr. and Mrs. Turnbeaugh actually slept there.

The Referee: I think they slept there on the night of the 14th.

Mr. O'Reilly: The night of the 14th.

The Referee: November 14th.

(Testimony of Clem V. Mulholland.)

Mr. O'Reilly: And continued to sleep there thereafter.

Mr. Snyder: Oh, no.

Mr. Brown: Oh, no.

The Referee: No, I wouldn't say that I am convinced of that, but I believe that they were there on that night.

Mr. O'Reilly: Then I want to further establish the fact that they did continue to live there thereafter.

The Referee: Well, put on your witnesses; let's proceed.

Mr. O'Reilly: Q. Do you know whether or not, as a matter of fact, they did continue to live there?

Mr. Brown: That calls for conclusion of the witness; object to that.

The Referee: Not any more than what she saw.

Mr. O'Reilly: Q. Do you know whether or not they were [119] there?

A. I will just answer it this way: I had occasion to go by there many times and they were there working always during the day, and of course I couldn't swear whether they slept there every night or not.

Q. I see.

A. But I was under the impression they were.

Recross Examination

By Mr. Brown: Q. You don't know, do you?

A. I don't know actually they slept in that house every night.

Mr. O'Reilly: All right, that is all.

(Testimony of Clem V. Mulholland.)

The Witness: They were playing house, if they didn't.

Can I go?

Mr. O'Reilly: Yes, you may go.

LYLE TURNBEAUGH,

called and sworn as a witness on behalf of the Bankrupts, testified as follows:

Mr. O'Reilly: Q. Please state your name.

A. Lyle Turnbeaugh.

Q. You are the son of Mr. and Mrs. Turnbeaugh? A. Yes.

Q. Where were you residing or living on or about the 14th day of November, 1940?

Mr. Snyder: Just a second. That is calling for opinion and conclusion of the witness; that is the issue in this case.

The Referee: Where was he residing? He is not a party to this proceeding.

Mr. O'Reilly: Where was home at that particular time, or where was he living?

The Referee: Well, I think that is permissible.

Mr. Snyder: Where he was living? [120]

Mr. Brown: Where he slept?

Mr. Snyder: Where he slept, ate, changed his clothes.

Mr. O'Reilly: Q. Where was your residence on or about the 14th day of November, 1940?

(Testimony of Lyle Turnbeaugh.)

Mr. Snyder: Object to that calling for conclusion of the witness.

Mr. O'Reilly: He can state what was his residence, if the Court please.

The Referee: It can be developed in cross-examination; we have got to finish this thing up, now.

The Witness: You want me to answer that?

Mr. O'Reilly: Q. You are nervous, aren't you. This is just a court hearing, don't get too nervous; these attorneys here, they won't hurt you, and I am sure I won't.

The Referee: The witness doesn't look nervous to me.

Mr. Snyder: You are not nervous at all, are you, old man?

The Witness: Oh, I hardly think so.

Mr. Snyder: Of course not.

Mr. O'Reilly: Q. Will you please state what I asked you?

A. Well, it was on Murphys Ferry Road at the place owned by Gagas, on that particular day.

Q. Well, to cut this thing short now: Do you know whether or not your mother and father actually slept in the garage on the premises where it is now located on October 14th, 1940, November 14th, 1940? A. Yes, I know that they did.

Q. And in the meantime where did you continue to sleep during the months of November, December and up until January?

A. I slept in this place where I was staying on Murphys Ferry Road. [121]

(Testimony of Lyle Turnbeaugh.)

Mr. Brown: The Gagas house?

A. Yes, that's right.

Mr. O'Reilly: Q. All of the months prior to the completion of the new home?

A. No; prior to the time that we moved into the garage.

Q. Moved into the garage. Now, do you know whether or not—I am going to ask you this question: Is it or is it not a fact that your mother and father continued to reside all the time, and slept as well as reside——

The Referee: Leave out the word "reside". That is the point that the court is going to try to determine in this case, where they resided.

Mr. O'Reilly: All right, I will stipulate that the word "reside" be omitted.

The Referee: Then it is a matter for the court.

Mr. O'Reilly: Q. (Continuing): In the garage house continuously from November 14th to the time that the house, itself, was completed?

Mr. Brown: Object to that on the ground it calls for the conclusion of the witness, no proper foundation laid.

The Referee: Well, I think the witness may state where his mother and father slept, where they had their meals, where they did thir washing, where they sat in the evenings, and where the children were and anything else that pertains to family life, then it is a matter for the court to determine what the facts are.

(Testimony of Lyle Turnbeaugh.)

Mr. O'Reilly: May he answer, if the Court please, may he answer the question?

The Referee: Certainly.

A. The folks stayed every night from November 14th on at the—out in the garage, or in the garage.

Q. Did you live at any time on the garage premises? [122]

A. Oh, yes, after the garage—after they started the house, why, we moved in there at about the time: I don't remember for sure when it was that we boys moved there.

Q. Well, before the garage was built did you sleep on the premises? A. Yes.

Q. Will you explain to the court under what circumstances?

A. Well, the lumber was delivered for the garage on October 31st, and I directed the fellow there that delivered the lumber, and that night we put up a tent and stayed there, and my brother and I rotated each evening up until the 14th.

Q. And on that date what happened?

A. Well, the folks moved to the garage, the furniture was brought there and they went down and slept there that evening.

Q. Did you supervise the delivery of the furniture?

A. I was there when the furniture was delivered, yes.

Q. By whom was it delivered?

A. It was delivered by two gentlemen from the

(Testimony of Lyle Turnbeaugh.)

Majestic Furniture Store, I believe the name of it was.

Q. Then did you help set up the furniture or not? A. Yes, I did, I helped.

Mr. O'Reilly: I think that is all.

Cross-Examination

By Mr. Snyder: Q. How old are your sisters?

A. My sisters, let's see: one of them is eight and the other one is ten or eleven, I forget just now.

Q. You wouldn't ever leave them by themselves, some of the family always stayed with them, isn't that right? A. Oh, yes.

Q. They were over at the Gagas place up until February 9th, I believe your father said, when you moved over to the new house?

A. Well, when we moved to the garage; they weren't there [123] until we all moved to the garage. Now, I don't know just what date we moved to the garage.

Q. Sometime after the first of the year?

A. Well, I wouldn't say to that, because I am not sure as to the date; but one of us always stayed with the girls when we were at Gagas' place.

Q. You don't know when your Dad gave up the Gagas place? A. I don't recall the date.

Mr. Snyder: I think that is all.

Mr. O'Reilly: That is all.

Now the brother of this gentleman that just left the stand is outside as a witness, and if it can be stipulated that he would testify as this witness tes-

(Testimony of Lyle Turnbeaugh.)

tified there would be no necessity to put him on the stand.

The Referee: Yes, it is all cumulative.

Mr. Brown: I think this is a dangerous matter if Your Honor feels that we should enter into a stipulation of that kind; we don't want to throw the onus back on the court, but we feel this is so vital that there should be a complete showing made, and maybe should have another day.

The Referee: The court has stated that it is satisfied that these people were sleeping there in that garage, but that they maintained their home where the children were, and they ate, and all the family affairs were carried on at the other place.

Mr. Snyder: That's right.

The Referee: Now, it is purely a legal question, I think. I would like to have some authority. The facts seem to be clear enough. I cannot see any purpose for the introduction of more testimony, however, if Mr. O'Reilly wishes to put on any other witnesses on any other point, you might do so.

Mr. Brown: Would the court recess for a few minutes?

Mr. O'Reilly: I haven't taken very much time of this [124] court, as the court well knows. This is very important to the Turnbeaugh's.

The Referee: All these matters are important.

Mr. O'Reilly: Mostly cross-examination here under 2055.

The Referee: I think we will have to have that other matter here at a different time. If you have

(Testimony of Lyle Turnbeaugh.)

any other witnesses on this exemption question, on any point, if you will bring them on now. The court is not going to hear any further examination under 21-A at this time. We will set that for another date.

Mr. O'Reilly: I see.

The Referee: I don't want to confuse the questions.

Mr. Brown: It is up to Mr. O'Reilly to assert his right to this claim.

Mr. O'Reilly: To what claim, to who?

Mr. Snyder: You have to prove the residence; the burden is on you.

Mr. O'Reilly: The question is whether the burden of proof has changed, and it hasn't as yet.

The Referee: Have you any witnesses?

Mr. O'Reilly: On this question of their sleeping there?

The Referee: Yes.

Mr. O'Reilly: Yes.

The Referee: Well, I am satisfied that they were sleeping there.

Mr. O'Reilly: During the whole time?

The Referee: Yes, slept there every night, probably.

Mr. Snyder: At least, on the 14th, which is a material matter.

The Referee: At least on the 14th.

Mr. O'Reilly: Then the court is not convinced they were sleeping there all the time?

(Testimony of Lyle Turnbeaugh.)

The Referee: Well, they say so; they say so.

[125]

Mr. Snyder: But that is not material, John.

The Referee: And it hasn't been refuted that they were sleeping there.

Mr. Brown: The question is whether they can have two homesteads.

The Referee: I think the whole question is purely a question of law as to whether or not there—the mere fact of the father and mother having gone over for the very purpose of claiming a homestead——

Mr. Snyder: Do they have to do more than just sleep there?

The Referee: Yes, that is the point.

Mr. Brown: Does that fall within the purview of good faith?

Mr. O'Reilly: As I understand, they do. Now, at this time, Your Honor, I didn't come prepared with any authorities.

The Referee: Well, I am not asking you to present any.

Mr. O'Reilly: If the court would make a reservation in that matter.

The Referee: Well, it will be submitted and I will ask you to submit some authority.

Mr. O'Reilly: My understanding of the Homestead Law is this: As a general rule it is not as harsh as Mr. Brown would have the court believe; the people who claim the homestead in any way do so in good faith. If they establish their home

(Testimony of Lyle Turnbeaugh.)

there, as these people did, then there is no question about that being their place of residence and abode. Because you cannot tell what is in the mind of a man without him expressing himself where his residence actually is, until he shows where it is, and so far as proof along those lines, that we have done, I think. If the court is desirous of obtaining or hearing any more evidence of it—— [126]

The Referee: No.

Mr. O'Reilly: (Continuing) ——I shall be glad to introduce it.

The Referee: No, they stated they were sleeping in the garage, and they moved some furniture up from Modesto; at the same time they were still maintaining a home at the Gagas place where their children were living, they were doing their washing and they were eating their meals there, excepting their luncheon.

Mr. Brown: If you can have two homesteads, you can have thirty.

The Referee: They were entertaining their relatives.

Mr. Snyder: Guests and relatives there.

The Referee: And so forth. The whole question is as to the law. I would like to have you gentlemen enlighten me as to what the law is. You may have a case right in point.

Mr. O'Reilly: I shall be very glad to do so, but I don't think that that should be required before Christmas. I have a lot of other matters.

(Testimony of Lyle Turnbeaugh.)

The Referee: The court is of the opinion that they went there and probably unquestionably were told by Mr. Galt that they had to be actually residing there.

Mr. O'Reilly: If the court requires Mr. Galt's testimony, I shall bring him up here.

The Referee: No, that is not necessary. Mr. Galt wouldn't know anything about it.

Mr. O'Reilly: If the Court please, I consulted with Mr. Galt before this court session, and he told me he distinctly remembers telling them.

The Referee: That wouldn't vary the terms of the declaration which was made on that day.

Mr. O'Reilly: Now, if the Court please, that is merely——

The Referee: If you have any other point. [127]

Mr. O'Reilly: (Continuing): This is the contract for the purchase of the furniture.

The Referee: There is no question about it in the court's mind, there is no question about that. Now, if you have any other points, other than the matter of their sleeping there and having that furniture there on that night, and having their lunch there while he was building the house.

Mr. O'Reilly: May I ask one question of the witness?

The Referee: Very well.

DEVEINE FLOY TURNBEAUGH,

recalled as a witness on behalf of the Bankrupts,
testified as follows:

Mr. O'Reilly: Q. Who made the homestead for you? A. Who?

Q. Who wrote it, made it up for you to sign?

A. Well, Mr. Galt's secretary, I suppose.

Q. Well, don't you know, was it being prepared or was it prepared while you were sitting there?

A. It was made while we were sitting there.

Q. Who gave the instructions to the stenographer? A. Mr. Galt.

Q. Mr. Galt.

Mr. Snyder: You are not trying to vary the terms of a written contract, are you, John?

Mr. O'Reilly: No, I want the court to know that this woman didn't have the advice of counsel, and I don't think Mr. Galt is an attorney.

Mr. Brown: Are you relying on the homestead or not relying on the homestead?

Mr. O'Reilly: Now, just a minute, Mr. Brown; I have an idea you will find out, if you will not interrupt me.

Mr. O'Reilly: Q. Mr. Galt at that time was handling an [128] escrow for you, was he not?

A. Yes.

Q. And the deed and all the instruments pertaining to the borrowing of money on this particular property were all in escrow at the time?

A. You mean pertaining to the property?

Q. Yes. A. Yes.

(Testimony of Deveine Floy Turnbeaugh.)

The Referee: The deed was on record or not on record?

Mr. O'Reilly: No. The deed was recorded, if the Court please, the same time as the homestead.

Mr. Snyder: In other words, no creditor got a chance to know what was going on.

Mr. O'Reilly: I don't know a thing about that.

Mr. Snyder: It was recorded on the 20th of November.

The Referee: The 20th.

Mr. Snyder: Three or four days after the execution.

The Referee: After the homestead. Oh, I see, a homestead was recorded first.

Mr. O'Reilly: Q. Now, you told Mr. Galt the facts pertaining to what you intended to do and all that, did you? A. Yes.

The Referee: Very well.

Mr. O'Reilly: Q. I did not represent you at that time? A. You what?

Q. You didn't know me at that time?

A. No.

Q. I didn't represent you? A. No.

The Referee: Any further point?

Mr. O'Reilly: That is all, I believe.

The Referee: Well then, the matter will be submitted, [129] I take it, on points and authorities, and you will present your authority.

Mr. O'Reilly: On the first issue.

The Referee: It is not necessary to discuss the facts.

(Testimony of Deveine Floy Turnbeaugh.)

Mr. O'Reilly: The court assumes, then, the burden of proof has changed?

Mr. Brown: The burden hasn't changed; you are relying on the homestead.

The Referee: I don't expect you to present all those facts, but I would like to have you give me the law. That is what is going to determine this case.

[Endorsed]: Filed April 10, 1944. [130]

[Title of Court and Causes.]

APPELLANTS' DESIGNATION OF RECORD

To the Clerk of the United States District Court for
the Northern District of California, Northern
Division:

You are hereby requested to make a record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to appeal taken in the above entitled proceedings, and to include in such record the following portion of the records and proceedings taken herein, to wit:

1. Order adjudging Orvey Ray Turnbeaugh, a bankrupt. [131]

2. Order adjudging Deveine Floy Turnbeaugh, a bankrupt.

3. Trustee's report setting aside exemption of bankrupts (omitting title of court and cause).

4. Exception of Mary Santos to trustee's report

of exemption (omitting title of court and cause and verification).

5. Opinion of Referee upon question of exception to trustee's report of exempt property (omitting title of court and cause).

6. Order of Referee dated April 21, 1943, denying the bankrupts' claim of exemption (omitting title of court and cause).

7. Petition for Review of Order of Referee dated April 21, 1943, (omitting title of court and cause and verification and excluding copy of Order of Referee and Opinion of Referee annexed thereto, it being ordered printed under designation Nos. 5 and 6).

8. Referee's certificate upon petition for review (omitting title of court and cause).

Q. Trustee's Exhibit 1. Declaration of Homestead filed by the bankrupts.

10. Minute order of Judge of the U. S. District Court approving Referee's Certificate and affirming Order of Referee (omitting title of court and cause).

11. Notice of Appeal (omitting title of court and cause).

12. Undertaking for costs on appeal (omitting title of court and cause).

13. Appellants' summary of testimony and excerpts from transcript of testimony (omitting title of court and cause).

14. Appellants' designation of records (omitting title of court and cause).

15. Notice of filing of appellants' designation of record, appellants' summary of testimony and appellants' excerpt from transcript of testimony (omitting title of court and cause).

16. Statement of points to be relied upon by appellants and notice of filing of same (omitting title of court and cause).

17. Affidavit of service of appellants' designation of record, notice of filing thereof, Appellants' summary and excerpts from transcript of testimony filed, and statement of points [132] to be relied upon by appellants (omitting title, court and cause).

Dated this 8th day of April, 1944.

ERNEST J. TORREGANO

Attorney for Appellants.

[Endorsed]: Filed April 10, 1944. [133]

[Title of Court and Causes.]

NOTICE OF FILING OF DESIGNATION
OF RECORD

To Mary A. Santos and Gumpert & Mazzer, Her
Attorneys:

You and each of you please take notice and you are hereby notified that appellants have filed with the Clerk of the United States District Court at Sacramento, California, the designation of record required by appellants to be certified to the United States Circuit Court of Appeals pursuant to the

appeal filed by appellants, a copy of said designation of record being served upon you together with a copy of the appellants' summary of testimony and excerpts from transcript of testimony and a [134] copy of statement of points to be relied upon by appellants.

Dated this 8th day of April, 1944.

ERNEST J. TORREGANO

Attorney for Appellants.

[Endorsed]: Filed April 10, 1944. [135]

[Title of Court and Causes.]

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANTS UNDER RULE 75

That the Order of the District Judge appealed from confirming the Referee's certificate and denying the bankrupt's claim of exemption is:

1. Contrary to law.
2. Not sustainable under the facts presented.
3. That the undisputed evidence affirmatively proved that the bankrupts resided upon the premises claimed as exempt, as required under the laws of exemption of the State of California. [136]
4. That the denial of the bankrupts' claim to a homestead exemption under the facts presented by the record were and are contrary to law and equity.

Dated this 8th day of April, 1944.

ERNEST J. TORREGANO

Attorney for Appellant.

[Endorsed]: Filed April 10, 1944. [137]

[Title of Court and Causes.]

AFFIDAVIT OF MAILING

Margaret McShane, being first duly sworn, deposes and says: that she is a citizen of the United States over the age of eighteen (18) years and not a party to the above entitled proceedings.

That affiant on the 8th day of April, 1944, at the City and County of San Francisco, State of California, deposited in the United States Post Office at San Francisco, California, a sealed envelope addressed to Messrs. Gumpert & Mazzer, 916 Bank of America Building, Stockton, California, attorneys for Mary A. Santos, [138] the objecting creditor to the trustee's report of exemption in the above entitled proceedings, the following records filed in the above entitled proceedings, to wit:

1. Appellants' designation of record.
2. Notice of Filing Appellants' Designation of Record.
3. Appellants' Summary and excerpts from transcript of testimony files.
4. Appellants' statement of points to be relied upon by appellants.

Further affiant saith not.

MARGARET McSHANE

Subscribed and sworn to before me this 8th day of April, 1944.

[Seal] ALFRED D. MARTIN

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 10, 1944. [139]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 139 pages, numbered from 1 to 139, inclusive, contain a full, true and correct transcript of certain records and proceedings in the matters of Orvey Ray Turnbeaugh, No. 10150 and Deveine Floy Turnbeaugh, No. 10151, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation of Record, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of Twenty-two and 85/100 (\$22.85) Dollars, and that the same has been paid to me by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and the official seal of said District Court, this 22nd day of April, A. D. 1944.

[Seal]

C. W. CALBREATH, Clerk

By F. M. LAMPERT,

Deputy Clerk. [140]

[Endorsed]: No. 10747. United States Circuit Court of Appeals for the Ninth Circuit. Orvey Ray Turnbeaugh and Deveine Floy Turnbeaugh, Appellants, vs. Mary A. Santos, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed April 24, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10747

ORVEY RAY TURNBEAUGH and DEVEINE
FLOY TURNBEAUGH,

Appellants,

vs.

MARY A. SANTOS,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY AND
DESIGNATION OF RECORD FOR CON-
SIDERATION ON APPEAL

Orvey Ray Turnbeaugh and Deveine Floy Turnbeaugh, as appellants herein, incorporate by refer-

ence their Statement of Points on which Appellants Intend to Rely which was filed in the District Court of the United States, Northern District of California, Northern Division, and which is part of the record on appeal of said Court in said proceeding.

That said appellants further hereby designate as their Record on Appeal in said proceeding which they think is necessary for the consideration thereof.

1. The record as heretofore designated by appellants in the District Court of the United States for the Northern District of California, Northern Division, and certified by the Clerk and on file with the above entitled Court.

2. Clerk's certification of said record.

Dated: This 1st day of May, 1944.

ERNEST J. TORREGANO

Attorney for Appellants.

Copy mailed to Messrs. Gumpert & Mazzera, Attorneys at Law, Stockton California. Attorneys for Appellee. May 1, 1944.

[Endorsed]: Filed May 2, 1944. Paul P. O'Brien, Clerk.

No. 10747

United States
Circuit Court of Appeals
For the Ninth Circuit.

ORVEY RAY TURNBEAUGH and DEVEINE
FLOY TURNBEAUGH,

Appellants,

vs.

MARY A. SANTOS,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

MAY 25 1944

PAUL P. O'BRIEN,



No. 10,747

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ORVEY RAY TURNBEAUGH and DEVEINE FLOY
TURNBEAUGH,

Appellants,

VS.

MARY A. SANTOS,

Appellee.

APPELLANTS' OPENING BRIEF.

ERNEST J. TORREGANO,

Mills Building, San Francisco,

Attorney for Appellants.

FILED

JUL 20 1944

PAUL P. O'BRIEN,

CLERK

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No. 10,747

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

ORVEY RAY TURNBEAUGH and DEVEINE FLOY
TURNBEAUGH,

Appellants,

vs.

MARY A. SANTOS,

Appellee.

APPELLANTS' OPENING BRIEF.

FACTS AND AUTHORITIES REGARDING JURISDICTION.

Appellants filed their voluntary petition in bankruptcy in the United States District Court for the Northern District of California on August 7, 1942, and were adjudged bankrupts on August 8, 1942. (Tr. pp. 2-3.)

The trustee in bankruptcy on October 15, 1942, filed a report setting aside the property claimed by them as exempt under the provisions of the Bankruptcy Act. (Tr. p. 9.)

On October 19, 1942, Mary A. Santos, a creditor, filed her objection to the trustee's report. (Tr. p. 5.) On April 21, 1943, the referee entered an order sustaining the creditor's objection and denying the bank-

rupts' exemption. (Tr. p. 19.) On April 30, 1943, the bankrupts filed a petition for review. (Tr. p. 25.) On March 3, 1944, the referee sent up his certificate upon the petition for review. (Tr. p. 26.)

On March 9, 1944, the district judge filed an order, without opinion, approving the referee's certificate and denying the bankrupts' claim of exemption. (Tr. p. 41.) On March 28, 1944, appellants filed their notice of appeal and undertaking for costs. (Tr. pp. 42-43.)

The proceedings were completed pursuant to Federal Rules 73-75.

The District Court had jurisdiction pursuant to Section 2a (10) of the Bankruptcy Act.

The Circuit Court of Appeals has jurisdiction of the appeal under and pursuant to Sections 24-25 of the Bankruptcy Act.

STATEMENT OF CASE.

The procedural steps which resulted in the denial of the appellants' claim to exemption appear in chronological order in the statement of facts and authorities regarding jurisdiction of this Court. The facts as uncontradictorily appear from the record are:

Appellants during the month of August, 1940, purchased the property described in their declaration of homestead. At that time it had no building thereon; subsequently the buildings were constructed. The first building upon the premises was a garage. The lumber for the building of the garage was delivered October 31, 1940. The garage was built in a little less than two

weeks' time. The size of the garage is 22 x 24. On November 15 appellants were living on the premises, husband and wife. (Tr. p. 46.)

They had a three-piece bedroom suite, springs, an inner-springs mattress, a library table and two rugs which were moved to the garage premises November 14, having been purchased from the Majestic Furniture Co., Modesto. (Tr. p. 47.)

They ate their lunch and had warm coffee during the time they were working on the place. The rest of their meals were eaten in restaurants. (Tr. p. 49.)

Their children lived at a rented place until the house was built on the homestead premises; they moved the children to the homestead premises on February 9, 1941. (Tr. p. 52.)

The children visited them on the homestead premises and took their lunch with them when they happened to be there. (Tr. p. 55.)

After they added the other improvements besides the garage, they had a six-room frame house with a bathroom, pressure system, electrical fixtures and all that sort of thing and landscaped it afterwards. (Tr. p. 61.)

The property was purchased through the Guaranty & Title Co. of Stockton and when they finished the deal on October 15 and got their deed, the husband said he wanted to put a homestead on the place and Mr. Galt of the Guaranty & Title Co. said, "You absolutely can't put a homestead there without living there." So he gave them thirty days to put the building up

and sleep there and that is the reason that the first and only night they slept there prior to November 15, 1940, was the 14th so that the 15th would be the thirty days. (Tr. p. 66.)

The only person who advised them regarding the homestead was Mr. Roy Galt, manager of the Guaranty & Title Co., Stockton. (Tr. p. 73.)

On November 14, 1940, between seven and eight o'clock in the evening a friend, Florence McGirk, visited them at the garage premises. (Tr. p. 94.) She saw the bedroom suite and that they had their bed made and were ready to stay there that night. (Tr. p. 95.) Appellants told Florence McGirk that the place was to be their garage when the house was finished. (Tr. p. 99.)

Mrs. Clarice Thiemann, a neighbor, saw the garage being built and during November, before Thanksgiving, she saw lights in there and a car and she visited them during the latter part of November in the garage quarters to collect for the Red Cross Roll Call and observed that it was very crowded and she felt embarrassed to accept Deveine Floy Turnbeaugh's, one of the appellants, invitation to come in. (Tr. p. 111.) From her breakfast nook she could see lights in the garage in the evening. (Tr. p. 112.) She saw them working about the place and she would say that it took about three weeks to build the garage. (Tr. p. 115.)

During the month of November, 1940, Clem Mulholland visited appellants at night time during the time the garage was being built for the purpose of

delivering a message to them to come to the telephone. (Tr. p. 121.) When he called at the building appellants were inside because he had to knock on the door. He tooted the horn and the appellant, Orvey Ray Turnbeaugh, turned on the light and he then told him that they were wanted on the telephone. (Tr. p. 122.) Appellant Orvey Ray Turnbeaugh told him that he would come as soon as he got dressed. (Tr. p. 123.) The next time that he was in the garage he observed that they had a bed in there. (Tr. p. 124.) They had also a sort of rug or something over their cement floor and had some kind of a stove, heating apparatus; but they had no electricity, they had a coal oil lamp. (Tr. p. 125.) He remembered definitely of going out that night and driving two miles up the road to deliver the telephone message and he was there when appellant Orvey Ray Turnbeaugh spoke. (Tr. p. 134.) The conversation was with the son and was in reference to materials. (Tr. p. 135.)

QUESTIONS INVOLVED.

(1) Was the order of the district judge denying the homestead claim of exemption contrary to law?

(2) Was the order of the referee, confirmed by the district judge, holding that the bankrupts were not actually residing upon the premises when they recorded the declaration of homestead sustainable under the facts and the record?

(3) Did the district judge err in confirming the order of the referee denying the bankrupts' claim to

their homestead exemption when the record of the undisputed evidence affirmatively proved that the bankrupts prior to and ever since the commencement of the bankruptcy proceedings actually resided on the premises claimed as homestead and recorded their declaration of homestead as required under the laws of the State of California?

(4) Was the denial of the bankrupts' claim to a homestead exemption under the facts presented by the records contrary to law and equity?

ARGUMENT.

POINT 1.

WAS THE ORDER OF THE DISTRICT JUDGE DENYING THE HOMESTEAD CLAIM OF EXEMPTION CONTRARY TO LAW?

The Bankruptcy Act in so far as it is pertinent to the consideration of this appeal requires the trustee and the Court to set aside to the bankrupts, the exemptions allowed under the state law:

“This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the state laws in force at the time of the filing of the Petition in the state wherein they have had their domicile for the six months immediately preceding filing of the Petition or for a longer portion of such six months than in any other state * * *”

Bankruptcy Act, Sec. 6 (U.S. Code Title 11, Chapt. 3, Sec. 24.)

The law of homestead in the State of California and under which the bankrupts are entitled to have the

Bankruptcy Court set aside their exemption of a homestead claimed under such law is found under Title V, Homesteads, Sections 1237-1269, inclusive, of the Civil Code.

Text writers and the Court have repeatedly enunciated the rule that homestead and exemption laws are remedial statutes and must be given liberal construction.

“Although homestead rights are purely creatures of statutes, it has been frequently stated that the homestead statute should be given a liberal construction in favor of the exemptions because it is a remedial and beneficial law and has an object of humane character.”

Cal. Juris., Vol. 13, p. 426.

“Public policy wisely looks to preservation and seeks means to prevent the breaking up of families and homes. Such public policy is declared in the Constitution and is furthered by homestead legislation exempting homesteads occupied by families from the hammer of the executioner. The policy of the homestead law has been to be humane and benevolent or benign. Its object is to secure to every housekeeper with a family the certain and uninterrupted enjoyment of a homestead to provide a place for the family and its surviving members where they may reside and enjoy the comforts of the home free from any anxiety that it shall be taken from them against their will by creditors.”

(*Id.* p. 431.)

“Homestead statutes are remedial. In interpreting them, the Court should, if it can reason-

ably do so under the concrete factual situation, make secure to the claimant all the domiciliary protection and immunity which his homestead attaches to the title.”

Re: Miller, 27 Fed. Supp. 999.

POINT 2.

WAS THE ORDER OF THE REFEREE, CONFIRMED BY THE DISTRICT JUDGE, HOLDING THAT THE BANKRUPTS WERE NOT ACTUALLY RESIDING UPON THE PREMISES WHEN THEY RECORDED THE DECLARATION OF HOMESTEAD SUSTAINABLE UNDER THE FACTS AND THE RECORDS?

The validity of the homestead claimed by appellants is challenged upon the grounds that the appellants did not actually reside upon the premises. Such challenge, however, finds no support in the record. The evidence introduced uncontradictorily proves that the appellants have continuously actually resided upon the premises. The harshness of the rule sought to be invoked by the referee, and confirmed by the district judge without his own views thereon, being expressed in a memorandum opinion, may be briefly summarized to the effect that it is necessary for a particular character of dwelling to be occupied by a homesteader in order to enable him to claim such premises as exempt; otherwise under the reasoning adopted by the referee and approved by the district judge, even if a homesteader sees fit to go through the hardships of living in a dwelling which does not come up to all the modern conveniences which others may be more fortunate to have, such manner of abode negatives the sworn un-

contradictory testimony of the actual residence claimed by the homesteaders.

It is also proper to approach at this point a discussion of the referee's memorandum opinion. With due respect to the learned referee, it is disclosed that in order to arrive at his erroneous conclusion he has incorporated in his opinion many matters which are not sustained by the record. For instance, the referee states:

"The claim of the bankrupts is fantastic. Is it credible that throughout a cold, dreary, wet winter, with chilling winds and driving rains and frost, that claimants lived in a garage without any ordinary facilities of living when they had a warm, comfortable, well-furnished home, with a family of young children, a mile and a quarter away? Can one imagine refined people like these dressing and undressing on a cold concrete floor in the dampness of winter nights;" etc. (Tr. p. 34.)

The referee has injected into his reasoning an element which does not appear in the records. No one testified that during the period of time the bankrupts resided in the garage it was "a cold, dreary, wet winter with chilling winds and driving rains and frost". As a matter of fact the evidence was exactly the contrary. Witness Florence McGirk testified as follows:

"Q. What kind of a night was it?

A. It was clear; it wasn't a rainy night.

Q. A clear night?

A. Yes.

Q. No rain?

A. I don't believe so.

Q. No fog?

A. Probably; might have been a fog, but I don't remember about that." (Tr. p. 108.)

The referee failed to add in his observations quoted above that on the concrete floor was a rug or covering. The testimony to that effect was as follows:

Clem V. Mulholland testified:

"Q. All right. Now, what did you observe when you were there on that occasion?

A. Well, there was a bed there and they had a sort of a rug or something over their cement floors. It was built for a garage, and there was a cement floor on it." (Tr. p. 125.)

This appeal does not involve a case where an owner of real property was attempting to conform with the statute merely to circumvent it but, on the contrary, the evidence discloses that the bankrupts knew that they had to reside on the premises in order to establish a valid homestead and therefore when they purchased the property in question they were so advised by Mr. Roy Galt, the manager of the Stockton Guaranty Title Company.

The testimony of Deveine Floy Turnbeaugh is as follows:

"Q. Where was it executed?

A. Why, in Mr. Galt's office in—— * * *

Q. Stockton?

A. Guaranty—Guaranty & Title.

Q. I take it that you came in and discussed this declaration of homestead with him before you prepared it?

A. We had spoke—I suppose I can go into detail?

Q. Yes, I want you to, please.

A. On the 15th of October we finished up our deal, got our deed, and my husband said he wanted to put a homestead on the place, and he says, 'You absolutely can't put a homestead there without living there.'

Q. I see.

A. Sleeping there. So he gave us thirty days to put that building up and sleep there. That is the reason that we slept there the night of November the 14th, so the 15th would be our thirty days.'' (Tr. p. 66.)

“Q. Yes, you went to Mr. Roy Galt, who is manager of the Stockton Guaranty Title Company, didn't you?

A. Yes.

Q. And you counseled with him about putting on a homestead, didn't you?

A. We asked him about it, yes.

Q. Yes. And you understood him to be the manager of the Stockton Guaranty Title Company at the time?

A. And expected what he told us to be absolutely on the up and up.

Q. And you told him the facts?

A. Yes, sir.

Q. And it was upon the facts that you related to him that he advised you what to do, isn't that correct?

A. Yes, sir.'' (Tr. p. 73.)

POINT 3.

DID THE DISTRICT JUDGE ERR IN CONFIRMING THE ORDER OF THE REFEREE DENYING THE BANKRUPTS' CLAIM TO THEIR HOMESTEAD EXEMPTION WHEN THE RECORD OF THE UNDISPUTED EVIDENCE AFFIRMATIVELY PROVED THAT THE BANKRUPTS PRIOR TO AND EVER SINCE THE COMMENCEMENT OF THE BANKRUPTCY PROCEEDINGS ACTUALLY RESIDED ON THE PREMISES CLAIMED AS HOMESTEAD AND RECORDED THEIR DECLARATION OF HOMESTEAD AS REQUIRED UNDER THE LAWS OF THE STATE OF CALIFORNIA?

The referee in his memorandum of opinion thought it unusual that the appellants could convert the garage into a dwelling house and use same without facilities and that such contention on their part was fantastic. However, a case dealing with almost a similar situation was before the District Court of the Southern District of California and that Court did not find that situation to be so unusual as to create a presumption or an inference against the homestead claimants. We quote from that decision:

“At that time the dwelling house on the smaller parcel was used as a place of residence for the family. On the larger parcel across the county road which was about 60 feet in width was a small house, a small building used as a place for the sale of merchandise and gasoline, a barn and nine small cabins. There was a well from which domestic water was obtained located at the side of the small store and filling station building. Toilet facilities were provided at the store building and were used by the family as well as others who were upon the grounds. The sewage was disposed of at a distance of about 120 feet from the toilets.

* * * The Referee upon the facts concluded that

during all the time involved in this controversy, the bankrupt and her family used the premises in controversy primarily as a place of residence and that the entire premises were, during all the time involved in this controversy, and/or necessary and convenient for the use of the bankrupt and her family as a place of residence independent of the business conducted on said premises and that said business was incidental and subordinate to the use of the bankrupt and her family of said premises for a home; that the entire premises was impressed with the homestead.”

In re: Shepardson, 28 F. (2d) 353, 12 A. B. R. (N. S.) 445.

**(a) THE REFEREE'S ORDER HAS NO BINDING EFFECT EITHER
UPON THE DISTRICT JUDGE OR THIS COURT.**

In the instant case this Court is not confronted with the applicable decisions to the effect that findings of facts of a referee in bankruptcy when confirmed by the district judge should not be disturbed by the Appellate Court unless manifest errors appear therefrom.

The referee's order in the case before the Court is an order made without any findings of facts. It is true that the referee prior to the entry of his order filed an opinion; however, this does not constitute a findings of facts or conclusions of law.

“We regret the necessity of returning this matter to the excellent and careful Referee by whom the order * * * was made. The trouble with his report is that (no doubt from inadvertence) he does not find the ultimate facts of the dispute, but

practically confines himself to a summary of the testimony and a statement of his disbelief therein. But this is merely negative, and we need something definite * * * We need to know the facts, not merely the evidence about the facts; and this is emphasized by the mass of testimony that has been taken and by the fact that the Referee heard and saw the witnesses and is much better able to find the facts than we can possibly be.”

Re: Turetz (D.C. Pa.), 205 Fed. 400, 29 A. B. R. 752.

In another case the Court said:

“This record is in rather an unsatisfactory shape; the Referee has found no facts and I have, therefore, to pass upon the evidence which has been returned by him, without any knowledge of the witnesses by which to judge of their credibility.”

Re: Yost (D.C. Pa.), 117 Fed. 792, 9 A. B. R. 153.

“The Referee discusses the facts and evidence in his opinion but such opinion does not constitute a findings of facts and conclusions of law. *Inter-State Circuit Inc. v. U. S.*, 304 U. S. 55, 56, 57, 58 S. Ct. 768, 82 L. ed. 1146. (See also opinion of Judge Woolsey of the Southern District of New York in the case of *Detective Comics v. Burns Publication, Inc.*, et al., 28 Fed. Supp. 399. Decided April 7, 1939.”

Re: Hill Stores Co., Inc., 28 Fed. Supp. 785, 41 A. B. R. (N. S.) 712.

The omission of findings of facts from the referee's order is important in this instance for the reason that a finding to the effect that appellants were not residing upon the premises would not be supported by the evidence.

The district judge's order confirming the referee's order of course falls in the same category because it also is not based upon any findings of facts.

(b) THE RECORD WITHOUT CONFLICT SHOWS THAT APPELLANTS, THE BANKRUPTS, ACTUALLY RESIDED UPON THE PREMISES CLAIMED AND SET APART AS A HOMESTEAD.

The record discloses that there is no conflict regarding the actual residence of the bankrupts on the premises declared as a homestead and their continual residence thereon notwithstanding the unsupported statement of the referee in his opinion that "the evidence is vague and conflicting as to whether bankrupts actually slept in the garage prior to and at the time of the declaration of homestead". Before we refer to the record which indisputably proves the bankrupts' actual residence we desire to refer to the referee's own appraisal of the evidence at the time of the hearing before him.

"The Referee. The Court has stated that it is satisfied *that these people were sleeping there in that garage*, but that they maintained their home *where the children were*, and they ate, and all the family affairs were carried on at the other place.

Mr. Snyder. That's right.

The Referee. Now it is purely a legal question, I think. I would like to have some authority. *The facts seem to be clear enough*. I cannot see any

purpose for the introduction of more testimony however if Mr. O'Reilly wishes to put on any other witnesses *on any other point*, you might do so." (Tr. p. 148.) (Emphasis supplied.)

In view of the observation made by the referee during the hearing "*that the facts seem to be clear enough*" it is difficult to reconcile the statement in his opinion contained in the certificate sent to the district judge that "the evidence is vague and conflicting". (Tr. p. 33.)

At the hearing before the referee, he continually referred to the fact that the evidence was clear (Tr. pp. 141, 149, 150, 151, 152), but that the real question was a question of law.

"The Referee. I think the whole question is purely a question of law as to whether or not there—the mere fact of the father and mother having gone over for the very purpose of claiming a homestead——

Mr. Snyder. Do they have to do more than just sleep there?

The Referee. Yes, that is the point." (Tr. p. 150.)

"The Referee. * * * The whole question is as to the law. I would like to have you gentlemen enlighten me as to what the law is. You may have a case in point." (Tr. p. 151.)

The questions of law on which the referee apparently desired to be enlightened are supplied by the following cases:

The Supreme Court of the State of California in a leading case on the question of homestead uses this language:

“Conceding as claimed for the appellant that he went back to the house for the purpose of qualifying himself to file a new declaration, still it does not follow that his residence was not actual. He had taken up his abode in the house and had slept there one night. His wife and child did not go with him but it was not absolutely necessary that they should. One may have an actual residence in a house though his family be away and he takes his meals elsewhere. Nor is the fact that he had slept there but one night decisive of the question. After making an actual residence upon the property, one may file a homestead upon it at the end of a day as well as at the end of a month or a year, so one may file and maintain a homestead upon property which is partially rented out or used for other purposes than his residence. (Ackley v. Chamberlain, 16 Cal. 181; Phelps v. Rooney, 9 Wis. 70.)”

Skinner v. Hall, 69 Cal. at p. 198.

It is apparent therefore from *Skinner v. Hall*, *supra*, which has been followed in California that even though a person resides on the premises only one night he may nevertheless file a homestead as provided under Section 1237 of the Civil Code of the State of California.

“Under the rule of liberal construction which it has repeatedly been held should be extended to our homestead laws, in every permissible case where the premises are the bona fide home of the

parties it should be held that the business conducted within the premises is not the paramount and principal purpose but that the home is the main thing and not the business. The fact that the declarants occupied different rooms in the building on different occasions is not of great importance.”

McKay v. Gesford, 163 Cal. 243.

See also

Heathman v. Holmes, 94 Cal. 291.

The record discloses that the referee expressed himself as satisfied that the appellants were actually sleeping on the premises.

“The Referee. Have you any witnesses?

Mr. O'Reilly. On this question of their sleeping there?

The Referee. Yes.

Mr. O'Reilly. Yes.

The Referee. *Well I am satisfied that they were sleeping there.*

Mr. O'Reilly. During the whole time?

The Referee. *Yes, slept there every night probably.* (Emphasis supplied.)

Mr. Snyder. At least on the 14th which is a material matter.

The Referee. At least on the 14th.

Mr. O'Reilly. Then the Court is not convinced they were sleeping there all the time?” (Tr. p. 149.)

“The Referee. Well, they say so; they say so.

Mr. Snyder. But that is not material, John.

The Referee. And it hasn't been refuted that they were sleeping there.” (Tr. p. 150.)

“Mr. O’Reilly. * * * If the Court is desirous of obtaining or hearing any more evidence of it—

The Referee. No.

Mr. O’Reilly (continuing). —I shall be glad to introduce it.

The Referee. No, they stated they were sleeping in the garage, and they moved some furniture up from Modesto; at the same time they were still maintaining a home at the Gagas place where their children were living, they were doing their washing and they were eating their meals there, excepting their luncheon.” (Tr. p. 151.)

* * * * *

“The Referee. The Court is of the opinion that they went there and probably unquestionably were told by Mr. Galt that they had to be actually residing there.

Mr. O’Reilly. If the Court requires Mr. Galt’s testimony, I shall bring him up here.

The Referee. No, that is not necessary. Mr. Galt wouldn’t know anything about it.

* * * * *

The Referee. There is no question about it in the Court’s mind, there is no question about that. Now, if you have any other points, other than the matter of their sleeping there and having their furniture there on that night, and having their lunch there while he was building the house.” (Tr. p. 152.)

* * * * *

“The Referee. I don’t expect you to present all those facts but I would like to have you give me the law. That is what is going to determine this case.” (Tr. p. 155.)

The elements which the referee was of the opinion supported his conclusion cannot give the appellee any comfort because the decisions cited by the referee do not support his conclusion.

In *Tromans v. Mahlmans*, 92 Cal. 108, 27 Pac. 1094, the Court correctly stated the rule that the actual residence required of a declarant must be real and not sham or pretended.

In *Lakas v. Archambault*, 38 Cal. App., pp. 371-372, the Court expressly stated that the evidence of intention was to be determined from the *evidence before it*. (Emphasis supplied.)

In *Bullis v. Stamford*, 178 Cal. 40, cited by the referee, the evidence showed that the husband not only by his solemn declaration of oath but every overt act indicated his intention as running with his physical presence to make Los Angeles his place of residence and not in Fresno as alleged in the declaration of homestead.

In *Johnson v. De Beck*, 198 Cal. 177, cited by the referee, the Court properly held that it was not bound to accept the mere testimony of the husband and wife as being conclusive as to their intention but as to whether or not they actually resided on the premises at the time of the declaration was a question of fact to be determined by the Court from the evidence before it.

The evidence before the referee not only included the testimony of the appellants, husband and wife, but testimony of other witnesses which corroborated them.

The declaration of homestead was also introduced in evidence and under the law is *prima facie* evidence of its content when it is verified.

Civil Code, Sec. 1263 (5).

Applying the cases which the referee has cited in his opinion to the facts in the instant case we find an entirely different situation. The physical actual residence on the homestead premises appears from the uncontradicted testimony of appellants and uncontradicted testimony of the witnesses who have corroborated them. Appellants' intention of an actual residence upon the premises consistently appears from their past, present and subsequent actions.

After the completion of the garage a six-room frame house with one bathroom and a pressure system and electrical fixtures was constructed. Appellants also landscaped the premises afterwards. (Tr. p. 61.)

It has been generally held that whether a party's removal constitutes a change of residence depends on his intention in making such removal or the *animo manendi*.

In re: Dean, 208 Fed. 1018-1019.

Likewise it is held that the test of "residence" is: Did one remove from his former residence with an intention to abandon the same and an intention of acquiring a new residence.

In re: Peterson's Guardianship, 229 N. W. 885-887, 119 Neb. 511.

Residence is a matter of intention. A minor cannot form such intention for himself.

In re: Cannon's Estate, 15 Pa. Co. Ct. R. 312-314.

“Residence” means a fixed abode but anything however short coupled with an intention will be sufficient.

Johnson v. Petty, 281 Pac. 276-279.

Where a person actually lives in a certain place with the intention of remaining there indefinitely, that place is his residence.

Marston v. Watson, 129 Pac. 611-612, 20 Cal. App. 465.

“Residence” is a place where a man’s habitation is fixed without any present purpose of removing therefrom.

In re: Turcick (D.C. Pa.), 33 F. (2d) 364.

It has also been held that where a man’s wife and children resided upon the homestead it fixes his residence there, although he may have taken but one meal a day and spent the rest of his time on another farm.

Marsden v. Troy (Tex.), 189 S. W. 960-965.

POINT 4.

WAS THE DENIAL OF THE BANKRUPTS’ CLAIM TO A HOMESTEAD EXEMPTION UNDER THE FACTS PRESENTED BY THE RECORDS CONTRARY TO LAW AND EQUITY?

Our discussion of the record and the law in support of points 1, 2, and 3 amply give answer to the question propounded under the above point. The record affirmatively shows that to deny the appellants of their homestead exemption under the facts presented by the record would be contrary to law and equity. The record affirmatively shows that not only were the appellants living on the premises at the time the

declaration of homestead was filed but that they were living on the premises continuously thereafter and at the time of the hearing before the referee.

The exemption laws are not as harsh as the appellee and the lower Court contend. However, if there were any doubt in the referee's mind of the appellants' residence upon the premises at the time of the declaration of their homestead, certainly no doubt could exist in his mind at the time of the hearing because, as stated, the record affirmatively shows that they were residing upon the premises then.

We, of course, do not concede that there is anything in the record to sustain the referee's opinion or a finding, if one was made, to the effect that the appellants were not actually residing upon the premises as claimed but in furtherance of the humane policy of the law looking to the preservation of the homestead and the exemption claimed thereby, equity would have required the referee to have permitted the appellants to satisfy any doubt in his mind by permitting them to execute and record a new declaration. The trustee's rights under the amendment of the Bankruptcy Act, as it existed at the time of the hearing, did not foreclose the appellants from their homestead exemption. From what we have said, it therefore follows that the district judge in his consideration of the referee's certificate upon the petition for review should have remanded the matter back to the referee with direction to permit the appellants to comply with any requirement which the referee believed had not been complied with so as to entitle them to their exemption.

CONCLUSION.

Upon the record as made in these proceedings, we earnestly urge that the lower Court has erred and that the order of the district judge confirming the referee's certificate and denying the appellants their homestead exemption should be reversed and the matter remanded to the referee with directions to allow the appellants their exemption and, if necessary, to have such further proceedings before him as would enable the appellants to obtain the benefit of the Bankruptcy Act requiring that their homestead be set apart to them as exempt.

Dated, San Francisco,
July 19, 1944.

Respectfully submitted,

ERNEST J. TORREGANO,
Attorney for Appellants.

No. 10,747

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ORVEY RAY TURNBEAUGH and DEVEINE FLOY
TURNBEAUGH,

Appellants,

VS.

MARY A. SANTOS,

Appellee.

BRIEF FOR APPELLEE.

GUMPERT & MAZZERA,

Bank of America Building, Stockton, California,

Attorneys for Appellee.

FILED

AUG - 8 1944

PAUL P. O'BRIEN,
CLERK



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IN THE

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ORVEY RAY TURNBEAUGH and DEVEINE FLOY

TURNBEAUGH,

Appellants,

VS.

MARY A. SANTOS,

Appellee.

BRIEF FOR APPELLEE.

A. INTRODUCTION.

At the time of the filing of the petition in bankruptcy involved herein, the bankrupts listed as a portion of their assets certain real property and buildings appurtenant thereto, situated near the City of Manteca, County of San Joaquin, State of California. The bankrupts claimed this real property as being exempt by virtue of a declaration of homestead covering the same. In their declaration of homestead the bankrupts stated that these premises were in effect the actual place of residence of the bankrupts and their family at the time of the execution of the declaration. Evidence was introduced at the conclusion of which

the Referee stated (Transcript, page 148): "The Court has stated that it is satisfied that these people were sleeping there in that garage, but that they maintained their home where the children were, and they ate, and all the family affairs were carried on at the other place." Thereafter the Referee specifically found (Transcript, page 34): "The Court is convinced that the bankrupts did not actually reside on the premises herein involved on November 15, 1940 and that any semblance of residence thereon, at the time of the declaration, was not real, but sham and pretended and not bona fide and genuine. Inasmuch as the homestead statutes require actual residence at the time of the declaration of homestead, it must follow that said homestead is invalid and of no force and effect whatever."

Thereafter the bankrupts' claim of exemption was denied and this appeal taken.

The real issue thus presented by this appeal is the question of whether or not the evidence supports the finding of the Referee.

B. STATEMENT OF FACTS.

There was a definite conflict in the evidence involved and we wish to point out herein definitely the facts upon which the Referee based his finding and order, and also to point out that certain statements contained in the "Statement of Case" (Appellants' Opening Brief, page 2 et seq.) are not true.

The evidence at the hearings disclosed the following facts:

The bankrupts executed their declaration of homestead on November 15, 1940, and filed and recorded it on November 20, 1940. They had constructed on the premises at the time of the executing of the homestead a building which was to be used for a garage only, which building was the only building on the premises at the time (Transcript, page 60). This building had no modern toilet and bath facilities (Transcript, pages 58 and 65). It had a cement floor and one side of the building was composed of a large garage door (Transcript, pages 46 and 126).

On the date of the recording of the declaration of homestead and prior thereto there was no running water on the premises and the water that was used had to be carried a considerable distance from the premises that the bankrupts were renting from a third person (Transcript, page 47). At the time the bankrupts, husband and wife, were sleeping in the garage building, using a bedroom set that they had purchased and put therein (Transcript, page 47).

During all of the time the bankrupts were renting from one George Gagos an adjoining premises upon which there was a large five-room house (Transcript, page 50). On the rented premises the bankrupts and their family, composed of two sons and a young daughter, had been living for some time (Transcript, page 52). On these rented premises they had all of the furniture which they possessed (Transcript, page 58).

other than the bedroom set which was put in the garage, together with their dishes, cooking utensils, personal effects, clothing (Transcript, pages 56 and 68), food (Transcript, page 58), personal papers and other similar articles. During all of this period of time the children slept, bathed, kept their clothes, had their breakfast and dinner and lived on the rented premises (Transcript, pages 52 and 83) and the bankrupts rather than eating their meals in a restaurant, as stated in appellants' opening brief, page 3, cooked and ate their breakfast and dinner there (Transcript, page 51).

While on one occasion an individual called one evening upon the bankrupts in the garage where they were sleeping (Transcript, page 94), other relatives who called upon the bankrupts during this period prior to and including the date of the recording of the homestead were entertained and fed on the premises rented (Transcript, page 139). Prior to the recording of the declaration of the homestead Mrs. Turnbeaugh cooked all of the evening meals for her family in the rented premises and kept all of her personal effects there. During the period prior to and including the date of the recording of the homestead, according to Clem U. Mulholland, the reputed home of the bankrupts and their family was on the premises which was rented and where Mrs. Mulholland went first to look for them (Transcript, page 139). On one occasion during the period of time herein involved Mrs. Mulholland called upon the Turnbeaughs at the Gagos' house and found the table set for lunch and found all

of the parties involved there with the exception of Mr. Turnbeaugh (Transcript, page 139).

All of the laundry for the bankrupts and their family was done on the rented premises and what water they used was taken from the rented premises. It is a matter of fact that the water they used for drinking at the garage where the bankrupts slept was carried from the rented premises.

C. ARGUMENT.

I.

WHAT CONSTITUTES RESIDENCE IS A QUESTION OF FACT WHICH MUST BE DETERMINED FROM THE EVIDENCE OF THE SURROUNDING CIRCUMSTANCES.

The question of what constitutes actual residence is to be determined primarily from the expressed intention of the parties involved, together with evidence of the surrounding circumstances which are indicative of the actual fact of residence.

Skinner v. Hall, 69 Cal. 195;

Calif. Political Code, Section 52;

Lakas v. Archambault, 38 Cal. App. 363;

13 *Cal. Juris.* 454, Section 30 et seq.

The circumstances involved must evidence the fact that the homestead claimants are in good faith, manifesting a proper intention of making the premises their present residence, their present home, and their present permanent abiding place. Residence is defined in Webster's Dictionary as "that place of abode in

which one lives and makes his home; and where he eats and sleeps, surrounding himself with the comforts of a home and enjoying its immunities and privacies''.

It is the policy of the homestead law to protect a man's home and to give him a place to raise his family free from any claims of his creditors. However, the purpose of the homestead law is that of a shield, and it was never intended to be a sword with which an individual or individuals might defraud their creditors.

The law of the State of California requires that before any premises can become a homestead it must be the bona fide actual residence of the *family*.

Bullis v. Staniford, 178 Cal. 40;

Tromans v. Mahlman, 92 Cal. 1;

McNabb v. Byrnes, 92 Cal. App. 337;

Johnston v. DeBock, 198 Cal. 177;

Babcock v. Gibbs, 52 Cal. 629.

In order for there to be actual residence upon a premises and in order for them to assume the character of a homestead they must be occupied by the claimants' *family*; in other words premises never assume the character of a homestead until there is actual residence thereon by the *family* as a group.

Benedict v. Bunnell, 7 Cal. 245;

Cary v. Tice, 6 Cal. 625;

Tromans v. Mahlman, 92 Cal. 1 at 7;

Prescott v. Prescott, 45 Cal. 58;

Babcock v. Gibbs, 52 Cal. 629;

Aucker v. McCoy, 56 Cal. 524;

Pfister v. Dascey, 68 Cal. 572;

Lubbock v. McMann, 82 Cal. 228.

The case of *Skinner v. Hall*, 69 Cal. 195, seems to be in opposition to the above statement. However, in this case it was assumed by the Court that actual residence did exist upon the premises involved and the Court goes on to point out that actual residence would not be lost where the circumstances required the bankrupts' family to sleep and eat *temporarily* some place else. The case assumes the existence of actual residence, and does not discuss what is necessary to constitute actual residence. As pointed out in 29 *Corpus Juris* 806—Homesteads, Section 53:

“The fact that premises are occasionally occupied as a lodging place of temporary residence will not impress the homestead character thereon, especially where the actual and permanent residence of the debtor and his family is elsewhere.”

II.

APPLYING THE AUTHORITIES TO THE FACTS IN THIS CASE, TOGETHER WITH THE FINDINGS OF THE REFEREE, WE CONCLUDE THE ORDER OF THE REFEREE DENYING THE EXEMPTION AND THE ORDER OF THE DISTRICT COURT DENYING THE EXEMPTION AND CONFIRMING THE ORDER OF THE REFEREE ARE NOT CONTRARY TO LAW OR EQUITY AND THEY SHOULD BE AFFIRMED.

As hereinbefore pointed out the Referee in this case specifically found (Transcript, page 34) that the bankrupts did not actually reside on the premises

herein involved and that any semblance of residence thereon at the time of the declaration was not real but sham and pretended and not bona fide in general.

It is obvious from the evidence in this case that it was the rented Gagos' premises in which the bankrupts and their family, composed of two sons and a young daughter, were actually residing at all times prior to and including the time of the recording of the declaration of homestead. It was here where they had their meals, bathed and kept their clothes and personal effects; it was here where the family surrounded themselves with the comforts of a home; and it was here where they, as a family, enjoyed the immunities and privacies of a home. The conclusion is inescapable that their actual residence during the times that are material herein was in the rented premises and this is not destroyed by the fact that Mr. and Mrs. Turnbeaugh suffered the inconvenience of sleeping in the garage constructed on the premises which they now claim as their homestead.

The garage at no time ever was intended as a dwelling or abiding place. Subsequent to the date of the recording of the declaration of homestead there was completed on the premises a five-room residence involving a considerable expenditure. It was in this latter house where they intended to live and abide and where they all are now living and abiding.

The homestead law of the State of California, as we have hereinabove stated, was and is intended as a shield to protect an individual's family in their home

but the homestead law was never intended to be used to allow an individual to simulate an actual residence for the purpose of defrauding and defeating creditors.

When an individual and his family have a house in which they dwell, in which they make their home by actually living and abiding there and surrounding themselves with the comforts of a home, public policy is such that to a certain extent such a home should be protected from any claim of creditors. But until such actual residence on a premises has been established and a home created it cannot become the subject of a homestead. In the case of *Gaston v. Horn*, 138 N. W. 25 (Iowa), the homestead claimant and his sons were sleeping in a roofless house. They had a trunk and some bedding and other articles therein which had been taken from a house nearby where they had been living. The house upon which the homestead was claimed was not as yet completely habitable. The claimant continued to pay rent for the place where he had previously resided and he continued to get his meals there. The Court held that this was not sufficient occupancy to constitute actual residence sufficient to establish a homestead. It is quite apparent that this is a case substantially the same as the one that is presented to the Court on this appeal. We, therefore, respectfully submit that the order of the Referee denying the exemption and the order of the District Court supporting the Referee's order are amply supported by the facts and the law and equity in this case.

D. CONCLUSION.

Upon the record as made in these proceedings, we reiterate the lower Court has not erred and the order of the District Court affirming the Referee's findings and denying the appellants the homestead exemption should be affirmed.

Dated, Stockton, California,
August 7, 1944.

Respectfully submitted,
GUMPERT & MAZZERA,
Attorneys for Appellee.

No. 10748

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARTIN CULJAK and JOSEPH ZELKO, co-
partners in business under the firm name and
style of CULJAK & ZELKO,

Appellants,

vs.

DEL E. WEBB, doing business under the name
and style of DEL E. WEBB CONSTRUCTION CO., and WHITE & MILLER, CONTRACTORS, INC., a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

JUN 21 1951

PAUL P. O'BRIEN,
CLERK

No. 10748

United States
Circuit Court of Appeals

For the Ninth Circuit.

MARTIN CULJAK and JOSEPH ZELKO, co-
partners in business under the firm name and
style of CULJAK & ZELKO,

Appellants,

vs.

DEL E. WEBB, doing business under the name
and style of DEL E. WEBB CONSTRU-
TION CO., and WHITE & MILLER, CON-
TRACTORS, INC., a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Los Angeles, California

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Assistant United States Attorney
Tucson, Arizona

Attorney for Appellee [2*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
In and For the District of Arizona

Civil Action File No. 99 Tucson

MARTIN CULJAK and JOSEPH ZELKO, co-
partners in business under the firm name and
style of CULJAK & ZELKO,

Plaintiffs,

vs.

DEL E. WEBB, doing business under the name
and style of DEL E. WEBB CONSTRU-
TION CO., and WHITE & MILLER, CON-
TRACTORS, INC., a corporation,

Defendants.

COMPLAINT

Come now the plaintiffs above named and com-
plaining of the defendants above named, respect-
fully allege:

I.

The ground upon which the jurisdiction of this
Court depends is the diversity of citizenship of the
parties and the fact that the amount in controversy
exceeds, exclusive of interest and costs, the sum of
\$3,000.00. In this connection plaintiffs allege that
each of the plaintiffs is a citizen and resident of the
County of Los Angeles, State of California, that the
defendant, Del E. Webb, doing business under the
name and style of Del E. Webb Construction Co., is
a citizen and resident of the County of Maricopa,
[4] State of Arizona, and that the defendant, White

& Miller, Contractors, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Arizona with its principal place of business in the County of Pima, State of Arizona.

II.

That on or about the 1st day of December, 1940, by a contract in writing, denominated "Equipment Rental Agreement", a copy of which is hereto attached, marked "Exhibit A", and by reference made a part hereof, plaintiffs rented to defendants that certain Austin Trenching Machine, more specifically described in said agreement, for use by said defendants in certain construction work being prosecuted and carried on by defendants at Fort Huachuca, Arizona.

III.

That pursuant to said rental agreement plaintiffs delivered to defendants said trenching machine and that at the time it was so delivered said trenching machine was in a condition to render efficient, economic and continuous service and in such condition was accepted and received by defendants.

IV.

That said rental agreement provided that all necessary minor or field repairs to said trenching machine during the rental period should be made by defendants.

V.

That defendants failed, during said rental period, to make necessary minor and field repairs upon [5]

said trenching machine and that by reason of defendants' failure in this respect and as a direct and proximate result thereof, the said trenching machine when returned to plaintiffs on or about April 7, 1941 was in a damaged, deteriorated and unfit condition and was not in a condition to render efficient, economic and continuous service, and was not in the condition in which it was received by defendants from plaintiffs, reasonable and ordinary wear and tear excepted.

VI.

That for the purpose of having said trenching machine restored to the same reasonable condition as when delivered by plaintiffs to defendants as aforesaid, plaintiffs were obliged to expend and did expend and pay the sum of Two Thousand One Hundred and 38/100 Dollars (\$2,100.38) for reasonable repairs to said trenching machine, which repairs were made necessary by defendants' failure to have necessary and minor field repairs made to said trenching machine as from time to time needed and that by reason of defendants' failure to make said repairs, and as a direct and proximate result of such failure, while in use by said defendants under said rental agreement, plaintiffs have been damaged in said sum of Two Thousand One Hundred and 38/100 Dollars (\$2,100.38).

VII.

That a period of thirty days was necessarily consumed in making said reasonable repairs to said

trenching machine and that during said period of thirty days plaintiffs were deprived of the use of said trenching [6] machine; that the reasonable monthly rental value of said trenching machine is Fifteen Hundred Dollars (\$1500.00), and that plaintiffs were further damaged by reason of defendants' failure to make said repairs in the sum of Fifteen Hundred Dollars (\$1500.00).

Wherefore, plaintiffs pray judgment against defendants for the sum of Three Thousand Six Hundred and 38/100 Dollars (\$3,600.38), and for costs of suit herein.

CONNER & JONES

By ARCHIE R. CONNER

305 Valley National Bldg.

Tucson, Arizona

FRANK J. BARRY

448 South Hill Street

Los Angeles, California

Attorneys for Plaintiffs [7]

EXHIBIT A

EQUIPMENT RENTAL AGREEMENT

This Contract, entered into this 1st day of December, 1940 by Culjak and Zelko 1354 S. Bonnie Beach Place, Los Angeles, California ~~*a corporation,~~
~~organized and existing under the laws of the State~~
~~of ———~~ *a partnership consisting of Martin Culjak and Sgt. Zelko ~~*an individual trading as ———~~

*Delete all lines which do not apply.

of the City of Los Angeles in the state of California hereinafter called Lessor, and Del E. Webb Const. Co. and White and Miller Contractors, Incorporated, a corporation organized and existing under the laws of the State of Arizona of the City of Tucson, (Principal Office P. O. Box 2350) in the State of Arizona hereinafter called the Lessee,

Whereas, the Lessee has heretofore, to wit, on the 30th day of October, 1940, enter into a contract hereinafter called the principal contract, with the United States of America, hereinafter called the Government, to construct for the Government a complete Cantonment Camp, including necessary buildings, temporary structures, utilities and appurtenances thereto at or near Fort Huachuca, Arizona.

Whereas, the Lessor has agreed to rent to the Lessee for use in connection with the aforementioned construction the equipment leased on schedule "A" attached hereto and made a part hereof; and

Whereas, the Lessor has read and is familiar with each and every part of said principal contract, and the respective rights, powers, benefits and liabilities of the Lessee and the Government thereunder;

Now, Therefore, This Agreement Witnesseth: That the parties hereto do mutually agree as follows:

Article I

The Lessor shall furnish the equipment listed on Schedule [8] "A" attached hereto and made a part hereof. Equipment shall be in a condition to render

efficient, economic and continuous service. Each piece of equipment shall be clearly marked with the identification number set opposite such piece on schedule "A".

Article II

All necessary minor or field repairs to equipment shall be made by the Lessee without cost to the Lessor. Other than minor or field repairs shall be made by the Lessor without cost to the Lessee. All gasoline and oil for the operation of such equipment will be furnished by the Lessee.

Article III

Equipment is rented without operators. Any operator deemed incompetent by the Lessor and the Lessee shall be removed from any piece of equipment. Should the Lessor and the Lessee fail to agree as to the competency of any operator the matter shall be submitted to the Contracting Officer who signed the principal contract and his decision shall be final as to the parties hereto.

Article IV

The Lessor shall initiate shipment of the equipment to the site of the work immediately. It is estimated that the equipment will be used for approximately 700 working hours, but the Lessee reserves the right to increase or decrease the rental period.

Article V

A. The Lessor shall be paid at the rate prescribed in Schedule "A". The rental period shall begin on

the delivery of such equipment to a common carrier for shipment to the site of the work, as evidenced by the Bill of Lading covering such shipment, and shall terminate, unless title to the equipment passes to the Government at an earlier date, on the date of delivery of such equipment to a common carrier, for shipment from the [9] site of the work, as evidenced by the Bill of Lading covering such shipment, provided such equipment is delivered without delay after notice by the Lessee or the Contracting Officer, of the principal contract, to the Lessor that such equipment is no longer required; otherwise the rental shall terminate on the date of such notice. If such equipment is not in sound and workable condition when it arrives, at the work site the rental period therefor shall not begin until such equipment shall have been placed in sound and workable condition at the expense of the Lessor. No transportation charges for the shipment thereof shall be paid by the Lessee for any piece of equipment which arrives at the work site in other than sound and workable condition if such piece of equipment cannot be placed in sound and workable condition. The determination as to whether such equipment is in sound and workable condition shall, in every instance, be made by the Contracting Officer or his duly authorized representative. Slight delays in the use of any piece of equipment caused by necessary minor or field repairs and replacements shall not interrupt the rental period, but no rental shall be paid for the period of any delay in the use of

such piece of equipment caused by other than necessary minor or field repairs.

B. The minimum rental set forth in Schedule "A" shall be allowed for equipment in good repair and retained at the site of the work, provided such retention is approved in writing by the Contracting Officer or his duly authorized representative. Transportation will be paid by the Lessee f.o.b. cars at original point of shipment, and return transportation f.o.b. cars to the original point of shipment, or equivalent mileage, but charges for transportation of any piece of equipment over a distance in excess of Five Hundred Miles (500) must have written approval of the Contracting Officer or his duly authorized representative. [10] Only loading and/or unloading costs incurred at the worksite will be paid by the Lessee. Rental payments will be monthly on or about the 10th of the month for the previous calendar month.

Article VI

Failure of any piece of equipment to perform to the satisfaction of the Lessee or the Contracting Officer or his duly authorized representative shall be sufficient cause for the termination of this contract by the Lessee, or the requirement by the Lessee that the equipment be replaced with equipment of satisfactory performance.

Article VII

When the equipment rented hereunder shall arrive at the site of the work the Lessor shall file with the Lessee a schedule setting forth, (1) the fair

valuation of each piece of equipment at the time of its arrival and (2) the names and addresses of any and all persons holding any lien or encumbrance of any nature whatsoever against such piece of equipment together with the amount of the indebtedness secured by such lien or encumbrance. Such valuation shall be deemed final unless within ten days (10) after the equipment has been set up and operating, the Lessee or the Contracting Officer or his duly authorized representative shall modify such valuation. When and if the total rental paid to the lessor for any piece of equipment shall equal the value thereof, ~~plus one percent per month for each month or fraction thereof such piece of equipment shall have been in use,~~ no further rental shall be paid to the lessor and title shall vest in the Government. At the completion of the work or upon termination of the principal contract as provided in Article VI of the principal contract, the Government may at its option purchase any piece of such equipment by paying the Lessor the difference [11] between the valuation of such equipment ~~plus 1% per month for each month or part thereof such piece of equipment shall have been in use~~ and the total rental paid therefore for such piece of equipment.

Article VIII

Neither this contract nor any interest therein shall be assigned or transferred, except that the whole or any part is assignable to the Government.

Article IX

The Contractor shall have the same right and under the same conditions and terms to terminate this contract as has the Government in the principal contract.

Article X

This contract shall be subject to the written approval of the contracting Officer who executed the principal contract, or his duly authorized representative, and shall not be binding until so approved.

Article XI

The following changes were made in this agreement before it was signed by the parties hereto:

Article VII—Line 11—delete—“plus one percent per month for each month or fraction thereof such piece of equipment shall have been in use.” Delete—Line 18—“plus 1% per month for each month or part thereof such piece of equipment shall have in use.

This contract covers the rental of Austin Trenching Machine No. 11346—Model BE—Type C—Style 500 Twin City Engine Mfg. by the Minneapolis Steel and Mach. Co. Engine No. 350173.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

CULJAK & ZELKO

Lessor

By: (Signed) MARTIN CULJAK

Co-Partner

DELL E. WEBB CONSTRUCTION CO.

and

WHITE & MILLER CONTRACTORS, INC.

Lessee

By: (Signed) E. G. SHAUER

Office Mgr.

(Title)

Witness: [12]

(1) (Signed) A. E. FLEMING

(2) [Signature illegible]

(1) (Signed) J. C. MEADOWS

(2) (Signed) OLGA KNUTSON

I, Martin Culjak, certify that I am the co partner, Co Partnership named as the lessor herein; that Martin Culjak, who signed this agreement on behalf of the Lessor, was then Co Partner of said Co Partnership that said agreement was duly signed for and in behalf of said Co Partnership by au-

thority of its governing body, and is within the scope of its powers, as a co Partner

[Corporate Seal] Sgd. MARTIN CULJAK

Place 1354 S. Bonnie Beach
Place, Los Angeles, Cali--
fornia

Date January 13, 1941

I, E. G. Shauer, certify that I am the Office Mgr., secretary of the corporation named as the Lessee herein; that E. G. Shauer, who signed this agreement on behalf of the Lessee, was then Office Mgr. of said corporation; that said agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[Corporate Seal]

Place Fort Huachuca, Ariz.

Date Dec. 4, 1940

Approved:

[Illegible] (?J Moore?)

Lt. Col. QMC [13]

Schedule A	No. 38	Valuation	Machine	Rental
------------	--------	-----------	---------	--------

Type of Equipment:

Trenching Machine 16'

Chain bucket type

Manufacturer: Austin

Mfg. Co., Muskegon, Mich

Year of Model: Model BE

Type C—Style 500 Mach-

ine No. 11346	\$20,000.00	\$1500.00 per
		month for 1
		-8 hour shift

Type of Equipment:

Manufacturer

Year of Model

Item I

The lessee shall initiate shipment of equipment to the site of the work immediately. It is estimated that the equipment will be used for approximately 700 working hours, but the lessee reserves the right to increase or decrease the rental period.

Item II

A minimum rental period of 60 ~~hours per week~~ or days ~~per month~~ shall be allowed for equipment in good repair and retained at the site of the work, provided such retention is approved in writing by the constructing officer or his duly authorized representative. [14]

[Endorsed]: Filed August 22, 1941. [15]

[Title of District Court and Cause.]

ORDER TO FURNISH BILL OF
PARTICULARS

The defendants' motion for a more definite statement and for a bill of particulars having been referred to the Court and after being advised in the premises, it is ordered:

I.

That within fifteen (15) days after the service of this order on the attorneys for the plaintiffs, the plaintiffs deliver to the defendants' attorney a bill of particulars of the demand for which this action is brought stating fully the names of the person or persons to whom the said sum of money, to-wit: Two Thousand One Hundred and 38/100 (\$2,100.38) Dollars was paid.

II.

The particular parts purchased and used in the repair of said machine and the person or persons from whom such parts were purchased.

III.

The price paid for each of said parts.

IV.

The amount of labor employed in the repair of said [16] machine and the particular persons performing such labor.

V.

The time when said labor was paid for and the said parts purchased.

VI.

That plaintiffs set forth how and wherein said trenching machine was not in condition to render efficient, economic and continuous service when returned to plaintiffs.

VII.

That plaintiffs state what minor field repairs were not made by defendants upon said trenching machine.

VIII.

That plaintiffs be required to state the particulars as to how the said trenching machine, when returned to plaintiffs, was damaged and deteriorated.

IX.

That plaintiffs state in what particular said machine was not in the condition in which it was when received by defendants from plaintiffs, reasonable wear and tear excepted.

November,
Dated this 3rd day of ~~October~~, A. D. 1941.

ALBERT M. SAMES

Judge, United States District
Court for the District of
Arizona

JPD:L [17]

[Endorsed]: Filed November 3, 1941. [18]

[Title of District Court and Cause.]

BILL OF PARTICULARS

Come now the plaintiffs in the above entitled action and complying with the order heretofore made and entered in the above entitled action requiring plaintiffs to furnish defendants with a bill of particulars of the demand for which the above entitled action is brought, respectfully state as follows:

I.

The particular parts purchased and used in the repair of plaintiff's trenching machine rented to defendants, and the person or persons from whom such parts were purchased, the time when said parts were purchased, and the price paid for each of said parts, are as follows:

82 Multipedal slats and bolts, purchased from Harry C. Collins, 5753 South Alameda Street, Los Angeles, California, on or about July 8, 1941, for the sum and price of.....	\$ 1199.33
---	------------

[19]

2 Idler shafts, purchased from Harry C. Collins, 5753 South Alameda Street, Los Angeles, California, on or about July 8, 1941, for the sum and price of	\$ 30.90
---	----------

150 Excavator chain links, purchased from Alloy Steel and Metals Company, 1862 East 55th Street, Los Angeles, California, on or about July 8, 1941, for the sum and price of.....	757.05
---	--------

On or about September 1, 1941, Pioneer Blacksmith & Welding Company, 129 Llewellyn Street, Los Angeles, California, welded two gears, repaired backfiller board drawbar and supplied ten bolts, all for the sum and price of.....	33.77
---	-------

II.

The amount of labor employed in the repair of said machine, the particular persons performing such labor, and the time when said labor was paid for, are as follows, to-wit:

John Arambel @ 75c per hour

1941

Aug. 28 8 hrs.

Aug. 29 8 hrs.

Sept. 2 4 hrs.

Sept. 6, Paid.....\$15.00

Sept. 10 8 hrs.

Sept. 11 8 hrs.

Sept. 12 8 hrs.

Sept. 13, Paid.....\$18.00

Sept. 15 8 hrs.

Sept. 16 8 hrs.

Total hrs. 60@ 75c Sept. 17, Paid.....\$12.00

Total paid.....\$45.00

W. A. Brownfield @ \$1.25 per hour

1941

Sept. 2 8 hrs.

Sept. 3 8 hrs.

Sept. 4 8 hrs.

Sept. 5 8 hrs.

Sept. 6, Paid.....\$40.00

Sept. 8 8 hrs.

Sept. 9 3 hrs.

Sept. 11 8 hrs.

Sept. 12 8 hrs.

Sept. 13, Paid.....\$33.75

Sept. 15 8 hrs.

Sept. 16 8 hrs.

Total hrs. 75 @ \$1.25 Sept. 17, Paid.....\$20.00

Total paid.....\$93.75

Joseph Zelko @ \$1.50 per hour

1941

Aug. 28	.....	8 hrs.
Aug. 29	.....	8 hrs.
Aug. 30	.....	8 hrs.
Sept. 1	.....	8 hrs.
Sept. 2	.....	8 hrs.
Sept. 3	.....	8 hrs.
Sept. 4	.....	8 hrs.
Sept. 5	.....	8 hrs.
Sept. 8	.....	8 hrs.
Sept. 9	.....	8 hrs.
Sept. 10	.....	8 hrs.
Sept. 11	.....	8 hrs.
Sept. 12	.....	8 hrs.
Sept. 15	.....	8 hrs.
Sept. 16	.....	8 hrs.

 Total hrs. 120 @ \$1.50

\$180.00

Pat Devine @ \$1.50 per hour

1941

Aug. 28	.....	8 hrs.
Aug. 29	.....	8 hrs.
Aug. 30	.....	8 hrs.
Sept. 1	.....	8 hrs.
Sept. 2	.....	8 hrs.
Sept. 3	.....	8 hrs.
Sept. 4	.....	8 hrs.
Sept. 5	.....	8 hrs.
Sept. 8	.....	8 hrs.
Sept. 9	.....	8 hrs.
Sept. 10	.....	8 hrs.
Sept. 11	.....	8 hrs.
Sept. 12	.....	8 hrs.
Sept. 15	.....	8 hrs.
Sept. 16	.....	8 hrs.

 Total hrs. 120 @ \$1.50

\$180.00

 Total Labor.....\$498.75

(Joseph Zelko is one of the plaintiffs. Pat Devine has an interest in plaintiffs' business. Neither of them has as yet been paid for above labor.)

III.

In response to paragraph VI of the aforesaid order to furnish bill of particulars, plaintiffs state as follows: Track pads on the traction track of the trencher were so badly bent that the traction would [21] break street pavement on the streets whereon the machine would work and hence said machine would not be permitted by the authorities to be on the streets. Links on the excavating chain were so badly bent that the excavation apparatus was completely out of alinement. For this reason the machine would not dig a trench on the center line, but the excavating chain would keep slipping off the sprocket gear, with the result that the machine could not be kept on the direct course. The shafts of the traction track were also bent and this made the machine go off line. The machine, in such condition, would not do one-half the work which the same machine, in an efficient condition, would do, and, consequently, more manual labor would be required for straightening out the trench and keeping it straight. Such extra labor would double the cost of the trenching when done by an efficient machine.

IV.

In response to paragraphs VII and VIII of the aforesaid order to furnish bill of particulars, plaintiffs state as follows: Each time a pad on the trenching track became bent, it should have been repaired at once and such repair would constitute a minor field repair. Each time a link in the excavating chain became bent, it should have been immediately

replaced or straightened out and such would have been a minor field repair. It is apparent that these minor field repairs were not made at the times required and, consequently the machine became weakened and excessive load was placed upon it in doing what it would ordinarily do efficiently when in good condition [22] and repair. Moreover one defective part placed an excessive load on the other parts of the machine so that as a result the entire excavating chain and the entire traction track became bent and damaged beyond repair.

V.

In response to paragraph IX of the aforesaid order to furnish bill of particulars, plaintiffs state as follows: The machine, when delivered to defendants, was in good, efficient working order and repair, as appears from the contract. None of the defects which existed when the machine was returned existed at the time of the machine's delivery to the defendants. When it was returned the defects were immediately apparent.

Dated this 12th day of November, 1941.

CONNER & JONES

By ARCHIE R. CONNER

303-6 Valley National Bldg.

Tucson, Arizona

FRANK J. BARRY

448 South Hill Street

Los Angeles, California

Attorneys for Plaintiffs.

Copy received November 13, 1934.

JOHN P. DOUGHERTY

Asst. U. S. Atty and
Attorney for Defendants.

[23]

[Endorsed]: Filed November 13, 1941. [24]

[Title of District Court and Cause]

ANSWER

Comes now the defendants in the above-entitled case and make answer as follows:

I.

Admit the allegations contained in Paragraphs I to IV inclusive and deny each and every other allegation contained in the complaint herein.

Wherefore, the said defendants demand judgment dismissing said complaint with costs.

F. E. FLYNN

JOHN P. DOUGHERTY

Attorneys for defendants.
412 Federal Building,
Tucson, Ariz.

Received copy of Answer this 10th day of January, 1942.

CONNER & JONES

FRANK J. BARRY

Attorneys for Plaintiffs. cr

[25]

JPD:h

[Endorsed]: Filed January 10, 1942. [26]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated as follows:

That the attached list correctly reflects the cost of the labor and material employed in repairing the trenching machine involved in this case while the same was at Fort Huachuca; that paragraphs I and II of the Bill of Particulars on file herein correctly reflects the cost of the labor and material expended by the plaintiffs in repairing said machine in Los Angeles after its return from Fort Huachuca, but this shall not be deemed an admission by the defendants that all the labor and material set forth in said paragraphs were necessary to make the repairs required to place the machine in good order.

Dated at Tucson, Arizona, April 23rd, 1943. [27]

FRANK J. BARRY

448 South Hill Street

Los Angeles, California

CONNER & JONES

By GERALD JONES

303-6 Valley National Building,
Tucson, Arizona

Attorneys for Plaintiffs

FRANK E. FLYNN

United States Attorney

JOHN P. DOUGHERTY

Assistant U. S. Attorney

Tucson, Arizona

Attorneys for Defendants.

[28]

Parts & Time used on Austin Trenching Machine

Rented from Culjak & Zelko, Los Angeles, Calif.

By Del E. Webb Const. Co. & White & Miller Contr. Inc.

At Fort Huachuca, Arizona

Quantity	Description	Unit Price	Total
1 only	Adjusting Nut	3.47 ea.	3.47
1 "	Adjusting Screw	6.27 "	6.27
16 "	Sprockets	1.95 "	31.20
16 "	Wearing Plates	1.65 "	26.40
1 "	Clutch Center Plate	12.80 "	12.80
2 "	Clutch Driving Plates w/linings..	22.30 "	44.60
1 "	Adjusting Screw	1.53 "	1.53
1 "	Jew Clutch	13.30 "	13.30
1 "	Clutch Ring	6.35 "	6.35
1 "	Jew Clutch	13.75 "	13.75
1 "	Clutch Ring	7.20 "	7.20
1 "	Twin Disc Clutch Plate.....	15.40 "	15.40
4 "	Disc Clutch Springs .....	.15 "	.60
1 "	Driver Shaft	22.30 "	22.30
30 ft.	Baldwin Chain	1.80 ft.	54.00
2 only	Idler Rollers	9.00 ea.	18.00
12 "	Excavator Chain Links	4.80 "	57.60
7 "	Excavator Chain Bushings .....	.65 "	4.55
14 "	Excavator Chain Pins .....	.88 "	12.32
24 "	Excavator Chain Lock Pins.....	.07 "	1.68
36 "	Excavator Bucket Hanger Pins....	.30 "	10.80
2 "	Idler Rollers	9.00 "	18.00
29 ft.	20" 5 Ply Conveyor Belt.....	2.20 ft.	63.80
12 only	Excavator Chain Pins .....	.45 ea.	5.40
67 "	Excavator Chain Lock Pins.....	.04 "	2.68
36 "	Excavator Chain Links	2.45 "	88.20
24 "	Excavator Chain Bushings .....	.40 "	9.60
36 "	Excavator Chain Pins .....	.45 "	16.20
33 "	Excavator Chain Locking Pins....	.04 "	1.32
149 lbs.	Stoody Welding Rod .....	.14 lb.	20.86
17 "	Babbit .....	.47 "	7.99
12 ft.	30" Belting	2.40 ft.	28.80
12 only	Bolts	19.25 C	2.31
50 "	Bolts	14.30 C	7.15
50 "	Cap Screws	2.50 C	1.25
100 "	Hub Nuts	2.50 C	2.50
50 "	Nuts	2.50 C	1.25

Quantity	Description	Unit Price	Total
50 only	Screws	2.00 C	1.00
50 "	Nuts	2.00 C	1.00
12 "	Cap Screws	15.00 C	1.80
17.33 cu. ft.	Oxygen & Acetyline	1.84 cu. ft.	31.88
1 only	Steel Plate 14"x14"x1½".....	2.20 ea.	2.20
100 "	Screws for ditcher teeth.....	2.50 C	2.50
24 "	Alenite Nipples .....	.12 ea.	2.88
200 "	Washers 10 lbs. ....	.45 lb.	4.50
100 "	Bolts	15.40 C	15.40
[29]			
1 "	Hoist Screw	60.00	60.00
1 "	Clutch Ring	3.80	3.80
1 "	Bevel Gear	49.50	49.50
50 links	Excavator Chain	4.36	218.00
1190 only	Ditcher Points .....	.54	642.60
2 pc.	75' Cable ⅝" 6x19 S. S.....	15.60	31.20
100 only	H & L Shanks	2.75	275.00
4 "	Flanged Idler	9.00	36.00
118 "	Side Cutters	2.00	236.00
18 "	Side Cutters	2.75	49.50
72 "	Rooters	3.50	252.00
1 "	Clutch Shifting Ring	9.00	9.00
25 "	Chain Links	4.90	122.50
18 "	Side Cutters	2.50	45.00
12 "	Stan. Cutters	2.00	24.00
2 "	Sprockets	8.80	17.60
4 "	20" Buckets	27.50	110.00
28 "	Side Cutters	2.00	56.00
48 ft.	36" Conveyor Belting	3.74	179.52
1 only	Adjusting Screw—Buckets	6.65	6.65
1 "	Reverse Gear	54.50	54.50
1 "	Sprocket & Jaws	27.60	27.60
1 "	Bushing	4.20	4.20
2 "	Retaining Rings	4.50	9.00
1 "	Clutch Ring	4.20	4.20
1 "	Hoist Nuts	54.60	54.60
2 "	Conveyor Reverse Drive	48.50	97.00
1 "	Conveyor Drive Shaft	8.85	8.85
1 "	Bevel Gear	13.70	13.70
112 "	Teeth	2.00	224.00
25 "	Teeth	2.50	62.50
1 "	Hoist Screw	39.90	39.90
50 "	Excavator Chain link Pins.....	.06	3.00

Quantity	Description	Unit Price	Total
5 ft.	Rex Chain	1.92	9.60
1 only	Friction Shoe	22.50	22.50
1 "	Clutch Lever	3.00	3.00
1 "	Clutch Cone	5.15	5.15
1 "	Fan Belt	3.25	3.25
Sub Total.....			3,775.01

Date				
1/13/41	2	Hours Labor.....	1.375	2.75
1/18/41	4	" "	1.375	5.50
	12	" "	1.20	14.40
1/20/41	2	" "	1.20	2.40
	8	" "	1.375	11.00
1/21/41	8	" "	1.375	11.00
				[30]
1/22/41	8	" "	1.375	11.00
1/23/41	3	" "	1.20	3.60
1/24/41	3	" "	1.375	4.13
1/27/41	8	" "	1.375	11.00
1/29/41	2	" "	1.20	2.40
1/30/41	4	" "	1.20	4.80
2/10/41	4	" "	1.375	5.50
2/13/41	1	" "	1.20	1.20
2/14/41	4	" "	1.20	4.80
2/15/41	3	" "	1.375	5.13
2/20/41	4	" "	1.20	4.80
2/21/41	3	" "	1.20	3.60
2/25/41	5	" "	1.375	6.88
2/27/41	4	" "	1.375	5.50
3/ 1/41	12 1/2	" "	1.20	15.00
3/ 3/41	2 1/2	" "	1.375	3.44
3/10/41	5 1/2	" "	1.375	7.56
3/11/41	8	" "	1.375	11.00
3/12/41	1	" "	1.375	1.38
3/17/41	3	" "	1.375	4.12
3/18/41	7 1/2	" "	1.375	10.31
3/21/41	2	" "	1.375	2.75
3/24/41	2 1/2	" "	1.375	3.44
3/25/41	4 1/2	" "	1.375	6.19
3/26/41	3	" "	1.375	4.13
3/27/41	4 1/2	" "	1.375	6.19
3/30/41	4	" "	1.375	5.50
3/31/41	5	" "	1.375	6.88

Date					
4/ 1/41	2	Hours Labor.....	1.375	2.75	
4/ 3/41	4	“ “	1.375	5.50	
	4	“ “	1.20	4.80	
4/ 4/41	24	“ “	1.20	28.80	
	11	“ “	1.375	15.13	
4/ 8/41	9½	“ “	1.375	13.06	
4/ 9/41	6	“ “	1.375	8.25	
	12	“ “	1.20	14.40	
4/10/41	4	“ “	1.375	5.50	
4/11/41	10	“ “	1.375	13.75	
	24	“ “	1.20	28.80	
4/12/41	16	“ “	1.20	19.20	
	6	“ “	1.375	8.25	
4/14/41	26	“ “	1.20	31.20	
	4½	“ “	1.375	5.50	
4/16/41	16	“ “	1.20	19.20	
	2	“ “	1.375	2.75	
Total.....			\$4,211.13		

[31]

[Endorsed]: Filed April 23, 1943. [32]

[Title of District Court and Cause.]

CONDENSED NARRATIVE OF TESTIMONY

Preliminary discussion and request by Mr. Jones for amendment increasing the amount prayed for in the complaint to include the aggregate of the amounts pleaded as damages in the complaint. Amendment resisted by Mr. Dougherty upon the ground that any such increase is not justified by allegations of complaint. Upon suggestion by Mr. Jones that evidence upon the matter be received under Rule 43, the Court inquired whether the trial might proceed with that understanding, to which Mr. Dougherty agreed but with the understanding that the complaint would not be amended to include the extra \$1500.00.

TESTIMONY OF MARTIN CULJAK

(a witness for plaintiffs)

Upon Direct Examination

By Mr. Jones:

My name is Martin Culjak. I live at 1354 South Bonnie Beach Place, Los Angeles. I am a citizen of the United States and of the State of California and a resident of the latter State where I vote. Mr. Zelko is a citizen of the United States and of the State of California of which State he is a resident. I [33] think Del E. Webb is a citizen of the State of Arizona, at least he was when the complaint was filed. Joseph Zelko and I are in the business of sewer contractors, a copartnership under the name of Culjak and Zelko. I was first approached by the defendants about leasing this machine the last part of November, 1940. A fellow by the name of Wear-ean called me on the telephone and asked me if I had a trenching machine to rent and I told him we did have one.

Mr. Dougherty: What is the object of this line of testimony in regard to hearsay testimony, a conversation with a person not here?

Mr. Jones: I think the Court ought to receive it and we will connect it up by showing a chain of events leading from that conversation to the contract and the leasing of the machine, but if we do not, your Honor will have to disregard it. We ask that it be received under Rule 43 temporarily.

The Court: All right, let it be received.

The Witness (Continuing): He asked where was

(Testimony of Martin Culjak.)

our place, and he and Mr. Morrison, of White and Miller, came up in the evening of the same day he called up. I had a conversation with them at that time. They wanted to rent a machine and asked what I wanted for it, and I told him I never rented the machine before, and what is a reasonable price, that is what we rent it for, and he said, "The size of this machine, the rent would be fifteen hundred dollars." Mr. Morrison, who I was told represented White and Miller, said that. I asked if there was any rock in the ground, and he said "No rock, but some hard clay, and I said, "If that is the case, I rent you the machine." [34]

Mr. Dougherty: Mr. Cavanaugh says that Mr. Morrison was White and Miller's agent.

The Witness (Continuing): Then he asked if I would let them have the machine and I said I would. They said they were going to use it at Fort Huachuca, but of course I did not know where Fort Huachuca was or anything. I relied upon their statement about the rocky ground and absence of rocks. He said they would pay transportation to Fort Huachuca from the yard and back to the yard, and pay rental from the time the machine left the yard until it came back to the yard. I asked about the parts and stuff like that. They looked at the machine and I asked what shape they would bring the machine back in, and they said it would be in the same shape as it is right now. They said any repair parts that were needed they would take care of.

(Testimony of Martin Culjak.)

Mr. Dougherty: I wish to interpose an objection. This lawsuit is confined to the allegations in the contract?

The Court: Yes, I think it is.

Mr. Jones: I think ordinarily that is true, but I think the rules permit you to show the negotiations that led up to the contract, particularly without a jury.

Mr. Dougherty: As I understand it, the contract speaks for itself, but if there is any question about the interpretation of the contract, then evidence might be introduced for the purpose of interpretation.

Mr. Jones: [35] There is a question about the interpretation, bound to be, and I think the Court can receive the evidence of negotiations leading up to the contract in order to ascertain what the parties mean by the terms of the contract. In any event, it is all in, and if it is improper, the Court will disregard it.

The Witness (Continuing): They took the machine. There was no written contract signed at the time. They took it the first of December from the yard. I got the contract about a week or ten days afterwards.

We owned the trenching machine about 12 years, but it had not been in steady use for 12 years. I would say it had been in steady use about 10 or 11 months prior to the rental to Fort Huachuca. I mean by that that the period of 10 or 11 months was spread over the 12 year period and that during

(Testimony of Martin Culjak.)

that time, we never used the machine any day for more than one shift of 8 hours. The reason we did not use it more was mostly on account of the depression, as there was no contract work. During all that time it was kept in first-class condition by Mr. Devine who had taken care of it ever since we had it.

The machine with the extra parts cost about \$24,500.00. When rented to the defendants it was in first-class condition.

(At this point plaintiff's Exhibit 1 was received in evidence, being specifications containing pictures of a trenching machine of the Austin Machinery Company of Muskegon, Michigan.)

The Witness (Continuing): These specifications No. 2013, Austin trench machine, effective May 1, 1929, are specifications and pictures and descriptions of the machine we rented to the defendants. The weight of the machine was 40 tons. This is an excavator chain link. (Indicating) It is on Sheet No. 6. We call it the excavator bucket chain. The chain links are for the purpose of holding the [36] bucket line that excavates the trench. I have one of those chain links here in the courtroom. (Witness produces it) I would say it weighs about 10 pounds. The links are made of the materials described in those specifications there, on Sheet No. 1. (Indicating) These are the chain links of the chain on the boom. This is a boom and there is a chain line on each side of it connected with buckets.

(Testimony of Martin Culjak.)

They call them 18-inch buckets. They are about 16 inches inside, but 18 inches overall, and they are called 18-inch buckets.

Mr. Jones: If the Court please, I do not think we shall offer these in evidence. They are very heavy. But I should like your Honor to take a look at these links.

The Court: As I understand, the allegation of the complaint is that they were torn out of shape?

The Witness (Continuing): Some are torn and some bent. The traction pads are pads underneath the truck. Here is where the traction pads are. (Indicating)

There are 82 traction pads on the machine, 41 on each side. They were in first-class condition when the machine was rented to the defendants, never showed any wear on them at all. They had been used in the City of Los Angeles and County of Los Angeles 10 or 11 months, 8 hours per day at intermittent periods during the time we owned the machine. It had not been used on rough ground or on hard ground of any kind. The machine had been used around Los Angeles. We never ran into any hard soil at all.

There were 180 excavator links in the chain. I have one of those traction pads here. On Sheet No. 4 is the picture under the heading "Multipedal traction" of these traction pads. They [37] are called by different names, multiple pads, traction pads, treads, slats, cat pads. (Witness produces described pad)

(Testimony of Martin Culjak.)

Mr. Jones: Likewise, I won't offer this in evidence, but I call your Honor's attention, and counsel's, if I may, that at the ends here, (Indicating) it is wood and the rest is encased in steel, I presume.

The Witness (Continuing): This pad is 24 inches long. It weighs somewhere around 50 pounds. The wood goes through the entire length of the pad; it is just a support of the steel casing which is called the channel iron. This one I have produced is in good condition. When the pads are in good condition these caterpillars of this trenching machine can run over a pavement without damaging it. They are designed for that purpose. Before the machine went to Fort Huachuca it sure could run over pavement without injuring it. We had 35 miles of sewers in Los Angeles and never a pavement we used it on was injured. It did not damage the pavement in any way.

When I spoke about the machine being in first-class condition, that applied to all of its parts, buckets and everything, every part of the machine. Before the machine was sent to Fort Huachuca it worked in first-class condition.

After it was sent to Fort Huachuca and we signed the contract, the next I saw it was the latter part of April 1941 at the Southern Pacific freight depot. There was a fellow by the name of Brownfield representing the defendants with it. I did not make an inspection of the machine at that time. I just glanced over it. I could see all the chains were bent and the buckets shot and I could see it was not

(Testimony of Martin Culjak.)

right and I asked Brownfield about it, and he said, "Well, there is nothing I can do about it." Mr. [38] Devine made an inspection of the machine for me. I saw these multipedal pads on the machine. They were in bad condition, pretty well shot. The wooden blocks inside were all stripped and that iron cover on the pads was all bent in different directions.

I noticed the buckets were all patched up, welded up, and I saw a lot of loose rivets on the caterpillar links. They were pretty well bent and stretched and out of shape. When they are bent or stretched the machine does not operate. It loses its pitch and the two do not mesh in the chain. The defendants had Mr. Harry C. Collins make an inspection of the machine for them. He made that inspection in North Hollywood, Los Angeles, when the machine was in our possession.

We bought 82 track pads.

Before Mr. Collins appeared, I wrote a letter to the defendants about the condition of the machine and explained it to them. I wrote and mailed the letter May 7, 1941.

(There being no objection, a carbon copy of said letter was marked plaintiff's Exhibit 2 in evidence and reads as follows:)

(Testimony of Martin Culjak.)

May 7, 1941

Del E. Webb Construction Co. &
White & Miller Contractors, Inc.,
Fort Huachuca, Arizona.

Gentlemen:

On arrival of our Austin Trenching Machine Model 500- Serial #11346, we have found that the excavation chain has been so badly bent that it would not pay to repair it for use again, and we also find that the troweling track was so badly damaged that it would require a new track.

At the time Mr. Morrison was talking to us as [39] to the renting of said Trenching Machine, he told us that there was no rock in the job where the machine would be working, and through the records of the employees who had been working on the said job we find that there was plenty of rock, and due to this rocky condition the track was badly damaged and would require a new track.

Will you please see that we get this excavation chain and troweling track as early as possible. There are several other things that we will have to repair on said trenching machine to put it in workable condition, but we are over-

(Testimony of Martin Culjak.)

looking all those things if we are going to get this excavation chain and troweling track.

Very truly yours,

CULJAK & ZELKO

By

Co-partner

MC/MS

Where, in this letter, I speak about the troweling track, I refer to these track pads, of course, but we call it different names. It is well understood that I was referring to the pads there. I said that there were other things wrong with the machine, but that if we could get the links and pads replaced, we would overlook that.

The last part of June or the first of July, they notified us they would not make the repairs. I then went to our attorney and asked him what was the best thing to do, I mean to Mr. Frank J. Barry in Los Angeles. He said all we could do was buy the parts and put them in and pay for them, and if they would not pay for the repairs to take them into court. We gave an order [40] for the parts to Harry C. Collins, who represents the Austin Machinery Company, about the 7th or 8th of July, just orally and he accepted the order. I do not recall hardly any parts being bought for the machine from 1930 to 1940—no links that I remember. I had quite a lot of extra chain because we had the machine rigged to dig 35 feet and we had to buy the

(Testimony of Martin Culjak.)

extra new chain. The boom could be elongated so as to dig a deeper ditch than at Fort Huachuca.

Mr. Collins was not able to fill the order until the last part of August. We got from him the track pads and the excavating chains and some pins and bushings for those links and idler shafts. We bought those idler shafts because the ones in there were bent so bad we could not use them. They had been bent while in use by the defendants under this contract. I remember those excavator chain links were \$4.90 each plus sales tax. We actually put 180 links back in that chain. When the machine was sent to the defendants it had the same links as we put back on there to dig a 15-foot ditch; it could not be any less than 180. Although we listed 150 in the bill of particulars, actually we put in 180. The 30 links we had in stock were brand new, never used. When you lawyers put in there 150 you should have put in 180.

Mr. Jones: That is our fault. I shall ask to have an amendment for that. I think we shall prove conclusively it is 180.

This stipulation refers only to 82 multiple slats and bolts, \$1199.33. That is all the stipulation goes to.

Mr. Jones: Yes, they admit the links but the point is we only put 150 links in there and we should have put in 180. That is the [41] size of it.

The Witness: As to that item of \$33.77 for work done by Pioneer Blacksmith and Welding Company—They were cutting these bolts on these slats, the

(Testimony of Martin Culjak.)

bolts that hold these chain links; the bolts that hold the chain links that travel on the track. We had to burn the bolts off. They were so bent we could not get them out and had to burn them. I do not know where they were bent. I did not do the work myself. They were not bent when we sent the machine to Fort Huachuca and they were bent when they came back.

It took us about 30 days to repair the trenching machine.

John Arandel worked on the machine 60 hours at 75c per hour. That was a fair wage for the work he did at that time. Since then it would be more. W. A. Brownfield worked on the repair of the machine 75 hours. It was necessary that he work those hours. We paid him \$1.25 per hour. The reason we paid him more than we paid Mr. Arandel was that he was operating a backfiller for us and that was his pay at that time, the union scale for backfiller operators. The job was really \$1.50 per hour for repair work, but I paid him only \$1.25 because that was what we paid him on the backfiller. Mr. Zelco was paid \$1.50 per hour for the 120 hours he worked on this machine. He was one of the partners. His work was worth much more than \$1.50 per hour, but we only charged that. It was worth more because instead of putting in 8 hours he put in 10 or 12, and we charged only for 8. That work required skilled workmanship.

Pat Devine worked 120 hours at \$1.50. It was necessary that he do so. The wage of \$1.50 per hour

(Testimony of Martin Culjak.)

was proper and reasonable for him. We used that trenching machine after we got [42] it back, about 9 or 10 days, on a deep sewer along Long Ridge Avenue. It was used on that job about 2 days of 8 hour shifts actual work. On two jobs we used it 9 or 10 days, but on the Long Ridge job about 2 days. The other job we used it on was the Norwalk and Magnolia Boulevard job. That was a sewer job, through a private subdivision. Practically both jobs were the same, pretty nice digging, could not find any better digging, sand and clay mixed together.

We discontinued the use of the machine because we could not use it on any job that had pavement on it and could not use it on those jobs economically because it pulled off to one side and we had extra work to get the ditch right. We could not use this machine on a job where there was pavement because if you put it on light pavement the multiple track pads would dig up the pavement because they were all bent and they dug up the dirt.

After we found we could not use the machine, we did nothing except wait for the parts and try to get it fixed.

We could have rented the machine in August to a man named P. J. Artucovich and to Beback and Brackedge for \$1600.00 per month while we were waiting for those materials and parts to arrive. It would have been worth that much if we had used it ourselves, if it was in good condition. I had several calls for it. The damaged condition of those pads

(Testimony of Martin Culjak.)

and parts and of the excavator links could not have been caused if the machine had been subjected only to normal use.

In my opinion, the machine was subjected to some extraordinary use down there.

A man by the name of Nottingham also called me up and wanted to rent the machine. There would have been no trouble at all to rent it at \$1600.00 if it was in shape. [43]

Cross Examination

By Mr. Dougherty:

We purchased this machine in 1930. It was not brand new. It had been bought two or three months before. We bought it through Collins. I could not say how long it had been used before we bought it, but it was very little. It had been used at Belvedere Gardens in Los Angeles by George Mitchell.

We paid \$24,000.00 for the machine and extra parts, consisting of 36 inch buckets and idler shafts and rollers. I could not tell you offhand without checking my books what that amounted to, probably around \$2,000.00.

We first operated the machine in 1931 at Van Nuys, being in a sewer ditch. It was there 60 days. We did not use it after that until 1938 when we used it about 20 days in the town of Tehachapi in California 25 miles from Los Angeles. I cannot recall where we next used it. I do not keep track of the different jobs to tell exactly what job I went from one to another. I had a few little

(Testimony of Martin Culjak.)

jobs here and there. We had it about 14 or 15 months before we used it and then we did not use it until 1938 when we used it at Tehachapi.

I would say we did not use it more than 3 or 4 months from 1938 to 1940. Then in 1940, it was sent down here to Fort Huachuca some time around December 1st.

Since September 16, 1941, we had a job in Lancaster. We started that job the first of March 1942. That was the first job we had after September 16, 1941, and lasted about 20 days. We next rented it to William Simpson Company in San Diego about June 1942. It remained there about 2 months. We next had our own job in the County of Los Angeles at Olympic Boulevard and Server Avenue—where we operated about 15 days. We then took it to Ivis, California where we operated it 2 weeks. The next job was Camp Young where we took it in March 1943 for 2 weeks and 4 days. From [44] there we took it to the yard in Los Angeles where it still is. From 1931 to 1938 it was in the yard in Los Angeles. It is a closed yard with a shed to put the trenching machine in. At the time we repaired it we had 30 new links in our possession that we put on it. We got those links with the machine when we bought it in 1930. We had them all the time since we purchased the machine and did not put them on until in August or September, 1941. We made other repairs on that machine from April 17th when it was returned from Fort Huachuca until August 28th when we

(Testimony of Martin Culjak.)

overhauled it. We had to overhaul the transmission, the gears of which were all stripped. We did that job in Santa Monica. Of course, I can not keep all of those jobs in my mind. I skipped that job. We did this transmission after we put in the track pads after September 1941. I do not remember making any repairs on the machine from the time it was returned from Fort Huachuca till we started to overhaul it in 1941 the last part of August.

Our backfiller has been used in making repairs to that machine, but was not in Fort Huachuca. The item of \$33.77 in our bill of particulars to Pioneer Blacksmith and Welding Company is for cutting bolts on those multipedal pads.

It is the frame that holds the track that was cracked and had to be welded.

The Court: How much is that?

Mr. Jones: \$33.77. In other words, we used the wrong words. That was for cutting off the bolts. They were twisted and bent and they had to cut them off. It was \$33.77. We must have picked up the wrong words.

The Witness Continuing: [45] I testified to having paid Mr. Joseph Zelco \$1.50 per hour. Those are not top wages for that kind of work. \$1.62½ is top. We paid him \$1.50.

Joseph Zelco is a mechanic. He had a lot of mechanical experience before he went to contracting. Since he has been associated with me in business, he has worked with Mr. Devine on this particular machine and backfiller and such stuff as

(Testimony of Martin Culjak.)

that. Brownfield is not a first class machine man. He is an operator but not first class by no means in either line. He can get by when you can't get anybody else. He is not the mechanic or repair man that Zelco is.

Plaintiff's Exhibit I contains a true description and specifications of the same type of machine as this trench machine, but not this particular machine.

Regardless of what the picture shows, it takes 82 pads to put it in shape. This diagram may be different from the machine itself. They kept the machine on the Fort Huachuca job from December 1, 1940 until about the 16th or 17th of April, 1941. The total amount of rent received was \$8225.00 while the machine was at Fort Huachuca.

We ordered the repair parts, the multipedals and the chain links in July, 1941, around July 8th. I am pretty sure it was right about that time. I have no records with me. I know it was earlier than July 28th, about $21\frac{1}{2}$ months after the machine was returned to us. It was returned earlier than April 28th. I could not recall the exact date. It was put on the Long Ridge job. I did not keep the records of its having been kept there until May 7, 1941. It is probably true that it was removed to the Magnolia Boulevard job on May 13, 1941 and remained there until June 11, 1941. I could not recall the date. It is probable it was returned to the Long Ridge Avenue job on June 30, 1941 and [46] re-

(Testimony of Martin Culjak.)

mained there until July 2, 1941; as I say, I can not recall the dates. I testified there were 180 links in this chain. It could not be that there were only 68 links because we ordered 150 new ones from Collins and when we put the chain together it was 30 short. Harry Collins was the man who sold us the machine. He is engaged in the business of selling those machines and repair parts and has been for years.

Collins made an inspection of the machine about between the 15th and 20th of May. This multipedal pad we brought over here is a part of the multiple pads that were on the machine before it was sent to Fort Huachuca. That pad was not on the machine while at Fort Huachuca; it remained in our yard. We took one off of **each track**. There were 84 on there before and we took two off, so it had only 82 on it when it went to Fort Huachuca. The track is adjustable. You can take off a pad or put one on.

Q. Now, the pad you showed us here was pretty well cracked, was it not?

A. I did not pay no attention whether it was one we took off or one that was cracked. I could not tell you. That multipedal pad is, I expect, in the same condition as the other pads that were on the machine when it went to Fort Huachuca and is a fair example of the condition of the pads when they went to Fort Huachuca. We took these two pads, one on each side, off the machine so as to take the slack off of the track. That

(Testimony of Martin Culjak.)

does not mean that it was worn; it was not worn. The track itself was loose when we first bought it. It had too many pads on it. That was the reason, my operator told me, for taking them off. I could not tell, because I did not operate it myself, whether he operated it from 1930 to 1940 with the full number of pads or not.

Redirect Examination [47]

By Mr. Jones:

I spoke about overhauling the transmission and said that the gears were all shot. The transmission shaft was cracked; it was only about a quarter of an inch on the bottom, and had a crack the rest of the way, and there were three gears and they were all stripped. That condition arose about two or three days after we put these pads on the escalating chain. The shaft had been cracked during use in Fort Huachuca.

The overhauling was due to the condition that had been created there at Fort Huachuca. The expense in connection with that overhauling, the labor and material would run to about three hundred to four hundred dollars. I could not say exactly. I said we waited 21½ months before we actually ordered the repairs. We waited that long because Collins was taking the matter up with Del E. Webb Construction Company and White & Miller, and he did not hear from them as to whether they would do it or not, and I could not do anything until I found out what they would do about it.

(Testimony of Martin Culjak.)

I wrote them on May 7, 1941 and in that letter I asked them to take care of the damaged condition of this machine. Then Collins made the inspection. I heard from Collins the last part of June that they would not make the repairs. I then employed an attorney from Mr. Barry's office, on the 8th of July when we were at Mr. Barry's office, and that was when I gave them the order. I did not get a written confirmation of that order from Mr. Collins. I know he told me he had ordered that stuff, but could not say whether he actually confirmed it by a letter to me or not. In addition to my letter of May 7th, Mr. Barry wrote the defendants a letter demanding that they take care of this situation. That letter was written on July 8th, the day I was in his office. [48]

Re-Cross Examination

By Mr. Dougherty:

I did not mention the amount of three or four hundred dollars worth of repairs put on the machine after it had been overhauled in September. I did not mention that amount in any of my letters because it was not overhauled at the time and I did not know anything about it at the time we demanded this money. The damages I first stated in my letter of May 7th I did not care for anything else except to get those parts. I made those extra repairs the last part of September, after the 16th of September, and I did not discover that damage until that time. We know where the in-

(Testimony of Martin Culjak.)

jury was done as a matter of fact. The shaft itself showed an old rusted crack, and there was only about $\frac{1}{4}$ of an inch holding it. It was not crystallized. It was an old crack with rust in it. We could not discover it at the time the machine was first returned to us because it was encased and you could not see it. I did not mention this damage in our bill of particulars.

Mr. Jones: We do not make any specific claim for that, except in that \$1500.00 for general damages.

TESTIMONY OF PAT DEVINE

(a witness for plaintiffs)

Direct Examination

By Mr. Jones:

My name is Pat Devine. I live in San Gabriel, California. I am a citizen and resident of California. I am a trenching machine operator. I am 60 years old. I have been a trenching machine operator since 1912. I have worked practically with all trenching machines since 1912. I have operated this machine involved in this case. I, chiefly, operated it. Pete Liles also operated it for about 2 months. I remember when plaintiffs bought that machine. I think it was in 1930. It could be new and secondhand both when bought because it was used [49] a very little, about six weeks. The first purchaser who bought it could not make his

(Testimony of Pat Devine.)

payments. This is the first type of machine I ever worked on, the Austin trenching machine. I operated this particular trenching machine on 3 jobs, or something like that from the time they got it. The first place we operated it was in Van Nuys about April 1930, I believe. At that time, we operated it about 6 weeks. After that, there were a few minor jobs in between that and 1938. I did not work at all with trenching machines between 1930 and 1938. In 1938, I worked with it again in Tehachapi for 21 days. After that, it came back to the yard and I put it under the shed. All the work it did before we sent it to Fort Huachuca was the job in Van Nuys and a job in North Hollywood and another little job somewhere else down in Buena Park.

It is hard to tell the sum total of the time the machine worked in that period. I know it would be less than a year. I would say that that machine was used to the extent or equivalent to one shift of 8 hours per day for about 10 or 11 months, something like that, from 1930 to 1940. From my experience, I would say that machine had a life of 25 years. I would say the multipedal pads had a life of 75% of the life of the machine, something like 20 years. I mean with normal use. I worked one Austin trenching machine a little lighter than this 11 years and we never changed pads. They are the same design of pads. This other machine was operated on some good and some fairly hard clay, black adobe and red adobe and various kinds

(Testimony of Pat Devine.)

of soil. It was not adapted to work in hard ground with rocks and boulders in it. 'The machine can not be operated against ground as hard as the buckets because the material is just as hard as the buckets. Slate rock you can operate in. But you can not dig hard rock. I have been on several jobs where we took [50] off the track and put on a hoe and shovel. I did not mean a hoe operated by a man by hand. The whole boom drops in the ditch and you can lift a log three or four tons heavy.

Q. Was this a machine operated hoe?

A. It is a power shovel with the boom the opposite way. At the time the machine was rented, the pads looked alright to me. Of course, there were weather checks in the end of them. I inspected the machine two days before it was shipped to Fort Huachuca. At that time it looked like it was in first class shape. When I speak about operating it, the number of men we have besides the operator depends a lot upon the ground, what you are doing. If it is ground where you are likely to run into rock, you should have a couple of men in the back watching for rocks, and there is a bell to pull to tell the operator to look out for them or to slow down or pull out the clutch.

The operator himself cannot see where the trenching machine is digging. He needs a man on both sides. In soft ground you need just one man to shove in the loose dirt along the side. The smooth-surface pad which my attention is called to was one of the pads in that machine. I took it out

(Testimony of Pat Devine.)

myself after the job in North Hollywood because there was a lot of slack in the track before the machine was taken to Fort Huachuca. I took out one pad on each side, leaving 82 pads. All the pads were in the same condition as that better pad.

That pad is about 10% worn. It is a good pad. Comparing it with the other pads on that track, they were the same. At that time they were alright. The condition of that wood in the end is that it is weather-checked and maybe this bolt is too tight. It is riveted on both sides. That is more a weather-crack than anything else, a weather-check. It does not run all the way through. [51]

That wood is oak, specially prepared oak pressed under heavy pressure before it is put in. The purpose of having the wood in there is as a filler for this channel iron. It takes up jars and the like and acts as a shock absorber to some extent. Now, when the machine came back from Fort Huachuca, I took out this pad my attention is now called to from the machine. This second pad is wore out. The wood is all cracked up and spread too wide. When the pads lay flat on the surface, they buckle together, one against the other. That is due to the spread of this. (Indicating.) It is too wide. There is no play at all between the two pads. They fit right together on the surface.

This pad is all dented and will cut up the streets.

To use it on dirt surface you would have to build the filler in here and bring it up to its pitch.

(Testimony of Pat Devine.)

You can not use it on pavement because it would cut up the pavement. The weight comes up here. You can see where the weight of the whole machine came. That would cut up the pavement. Whatever value that pad has now is whatever you can get for it for junk, because you can not straighten this out.

As to the condition of the other 81 pads when the machine got back from the defendants, I think 65 of them would fall apart. They were mostly worse than this, but some may be a little better. I had to have a whole pile to get one I could bring together.

The condition on that pad is not due to normal use. The use that would bring about such a condition is loose rock, rock here and there, or a boulder projecting out of the ground. I mean when the machine is traveling on its own power.

In traveling across rocky ground with a machine of that sort, you should either clear them away or plank it. It [52] is not prudent or good operation to run a trenching machine over rocky ground that will produce a condition of that sort. Here is a link that worked all the time, practically since we got the machine. It is manganese steel casing.

This link I have here in my hand is alright, but out of balance I would say. I could not very well use it in the efficient operation of this trenching machine. She loses her pitch from the sprocket wheel. In place of the sprocket coming back here and catching on here (illustrating), it comes over

(Testimony of Pat Devine.)

here and buckles over, and this all bends down here like that. The link has been so warped it does not engage the sprocket right here between the links. You can not take a manganese steel link and repair it. The sprocket wheel catches there in the heel. There is a pin that goes in there. Here is the bushing. It is braised on there.

When we got the machine back in April 1941, I saw it and inspected it. I have testified as to what I found with reference to the multipedal pads. The condition of those links as compared to this one which I have said was defective and non-usable is that they were practically all the same.

There are 180 links on the machine. There were not many of them good. A lot of them would look like a good link but you would have to tap them to see whether they were fractured or not.

That can not be detected by a casual examination of an hour. You would have to tap the chain with a hammer. I did that. You could use 9 or 10 of those on a new chain by changing the pins and bushings. That is 9 or 10 out of 180 could be used. In my opinion, as an expert in the use of these machines, I would say that the condition I have described was brought about by the rocky condition. If the machine were operated in proper ground they could not all be in that condition. Here are the two chains, and if this chain came apart and the pin came out, and she drags [53] the bucket over, it would bend the link. Rocky ground, surely rocks there, nothing else would cause this damage.

(Testimony of Pat Devine.)

Brownfield delivered this machine to us. I understood he operated the machine at Fort Huachuca. I was down at the depot to take the machine from the train and for about 11½ hour I helped and I said, "Brownfield, this machine got an awful beating," and he said, "You are lucky you got it back like it is."

I discussed the pads with him. He said he told Mr. Cavanaugh that we would not accept the machine the way the pads and the buckets were, the condition they were in. I discussed the ground with him. He said it was rocks, all rocks. I discussed the links with him. He said some days they would put in 4 or 5 links a day for the broken links.

I never broke that type of link. From the time the plaintiffs bought this machine to the time it was sent to Fort Huachuca, there were no pads put in and no links bought, and during the operation of the machine, as I said at least 10 or 11 months, we had no need to put in additional links. Brownfield, who delivered the machine to us, is the man who was operating the machine at Fort Huachuca. I also found the upper structure of the boom hanger had been pulled down. On Exhibit I, that is where she hangs on the boom. There it is right there at the top of page C-5. (Indicating.) The effect on the boom was that one side pulled down more than the other and throws the tail block 3 inches off from the center of the ditch. That condition in

(Testimony of Pat Devine.)

that boom was not there when the machine was sent to Fort Huachuca.

Mr. Dougherty: We object to this line of testimony for the reason that there is nothing in the bill of particulars referring to damage to a boom hanger. [54]

Mr. Jones: But, if the Court please, as we said this morning, the complaint alleges, first with respect to the pads and the links and their cost, and the cost of putting them in, and installing them. Then it alleges the loss of use for one month, and then this further sum of \$1500.00 which we did not include in the amount of the prayer.

(Here a discussion between the attorneys for the respective parties and Court occurred, the substance of which was an objection on the part of the attorney for the defendants to the introduction of evidence of damages not specifically pleaded and not set forth in the bill of particulars. The Court granted the request of the attorney for the plaintiffs to amend the complaint to allege such damages, but stated that if such an amendment should be made, the court would grant a continuance to the defendants. After consultation by attorneys for plaintiffs with clients, Mr. Jones announced that the plaintiffs would prefer to have the case go on. Thereupon, the Court sustained the objection to any testimony as to such damages not particularized by the bill of particulars. Whereupon, with permission of the Court, Mr. Jones made the following offer of proof:

(Testimony of Pat Devine.)

Mr. Jones: We propose to prove that over and above the cost of the excavator links and the traction pads and the installation and the idler shafts mentioned in the bill of particulars, and also that little cutting job, that over and above that this machine was damaged in the particulars we shall mention, namely, the buckets and this boom he talked about, the boom on the machine, and in several other particulars which I cannot recall but to the extent of at least ten or eleven per cent of the value of the machine on the basis of the contract price of twenty thousand [55] dollars, and on that basis we thought we were entitled to an additional fifteen hundred dollars.

The Court: Of course that is an item of such importance that if it is not incorporated in the pleadings, and you ask to amend in that respect, I would have to grant a continuance if the amendment was insisted upon.

Mr. Jones: The objection to that will be deemed to be sustained?

The Court: Yes.

The Witness (Continuing): After the trenching machine came back from Fort Huachuca, it was used by the plaintiffs. I operated it in Long Ridge Avenue and in Van Nuys. I was there about 2 days, I guess. The ground was soft solid loam. I operated the machine there, but not very efficiently because the track pads would buckle up like this, (Illustrating) and the cat roller would come up and it would slide and it would go to the front end, pull

(Testimony of Pat Devine.)

off of the line for you. It pulled out several times and I had to go back up and straighten out before I could go ahead.

I took every other tooth out of the sprocket in order to give it a slack, so it would not buckle up, and even if she would, I could handle her. It was a 6 point sprocket, 6 flat points, and then a square point, and the teeth are in the square point, and by taking the teeth out, I gave it slack.

The sprocket was supposed to have 6 teeth in each for proper use. There were 12 on and I cut it down to 6. Then with the 6 teeth in the 2 sprockets, she jumped a sprocket twice on me. If the links were right she would not jump the sprocket.

With respect to taking that trenching machine over [56] paved streets in Los Angeles or anywhere else, in the condition those pads were, they would not let you go over the pavement at all. Before the machine went to Fort Huachuca, you could have taken it over the pavement in its then condition.

The width of the machine is 14 feet and if the pads cut up the pavement, you would have 8 extra feet of pavement to replace. I mean by that the ditch is 2 feet wide and what you break up you have to replace. The machine would break up any pavement up to 2 inches thick. It could be operated on a concrete street but not on an oiled street.

It would not make a true straight trench. I slacked the chain off of it and put on 2,000 pounds in front as a counter-balance on the front end, to

(Testimony of Pat Devine.)

try to hold her in line. That was necessary to keep the front wheels from sliding and also I put grabs on the front wheels.

When one track is locked, she will pull away—too much pressure on one side. That was due to the damaged condition of these pads. The machine was repaired some time in September. I know that 150 links were purchased by the plaintiff from Mr. Collins. I know that 180 were actually put in the new chain. The extra 30 links they took out of stock that had never been used. There was no depreciation on those; they were painted and in a dry shed.

The machine was kept from 1930 in a galvanized shed well protected. I was sick for several years, but I would go around there and fool around. I was not in their constant employ during those years. When I set it up there I planked up the tracks with 12 inch planks.

I testified there were 10 or 11 usable links in the chain; they could be used with an old chain. We did not use them because you would be using an old link against a new one and [57] would have to take out the bushing and get new pins. In doing that, the question of labor involved would be an even break. The bushing is braised in with several thousand pounds. If I had taken the 10 or 11 links out and put in new ones, I think the cost would be greater than for the old links.

The old links were in various places and not all together and there would be considerable labor and expense taking them out. Those links came from

(Testimony of Pat Devine.)

Collins in 20 foot sections. We put in the various sections together. I think the 30 links that were in stock were in a 25 foot length. I took 25 and picked out 5 more from another piece of chain and hooked them up. Brownfield and Zelko and me, and Aranbel worked on the job in putting in those links. I bossed the job. I could not say as to the number of hours Aranbel worked, but I do know he was there a long time. I was there before him. Zelko took the time.

Mr. Jones: The stipulation takes care of that. Isn't that right?

Mr. Dougherty: Yes.

The Witness: The work done by Aranbel was necessary and so was the work done by all of us. It is a hard job to take those tracks off and put them in. We would have to have more men than that if I did not have the crane there. We did not rent a crane for that. They have a crane of their own.

Mr. Zelko himself worked on the job. He is a boilermaker by trade and he did all the hard hammering. They paid him for 120 hours. As to whether \$1.50 per hour is a fair wage for me, I got more than that for operating. I got \$1.62 $\frac{1}{2}$ per hour. Brownfield worked on the job. I guess \$1.25 per hour was the schedule of wages for him. You have to pay whatever the schedule [58] of wages calls for. I guess that was the schedule.

Those old links are all there in the yard, piled in the shed. I guess they may be of value as junk.

(Testimony of Pat Devine.)

I don't know. It is very cheap salvage. Manganese steel hasn't much salvage value. The condition of those pads and links and idler shaft was not due to normal wear and tear and use of the machine. The damage to the pads was caused by the rocky right of way, and the pads were injured because of contact with the rocks.

We could not braise the shaft off with hydroelectric power. We had to have a welder cut it off. They would not turn at all when the track was moving. The whole track was sliding over it.

In my opinion, the cause of the damage to the chain links was breaks in the chain and rocks sticking out from the side of the bank that would bend the chain. Those links are not cast. You cannot heat manganese steel. They are like Babbitt metal. you cannot even fire them. You have to saw them with a hack saw. As to being brittle, they are very thin, the thinnest steel there is. You can not repair them. You cannot put it back like it was. The idea in making such a thing is that it takes a lot of wear. It is the next thing to case-hardened.

I said that in the actual operation of the machine in that condition, the trench would not run true, because you would never know. The least little hump in the ground and the pitch is lost and it is off an inch and the next is off an inch. When they are on the top, they are together about like this. (Illustrating) As to increasing the cost of operating the machine, you have to take the machine out of the ditch when you get off the line and straighten

(Testimony of Pat Devine.)

it out again. It would take 10 or 15 minutes to get out of the ditch and straighten it out.

The ground was no digging at all, just like air, just [59] pulling the dirt out. With the pads in that condition, there was no possible chance to operate efficiently.

As to the fair rental value of the machine in the summer and early fall of 1941, they even get around \$1500.00 a month. I know one man asked me about renting the machine during that time, Mr. Nuttingham. As to whether \$1500.00 is a reasonable rent for that machine, I owned a trenching machine of my own at one time, and I even got more around 20 years ago than they got. I used to get 25c a foot where they got 15. The number of feet you dig in a day depends on the soil. Where I dug in Camp Young, for the 348th Engineers, I would average 2,000 feet a day.

I would say that \$1500.00 or maybe \$1600.00 would be alright as rental. There is no profit in that because I know from experience.

Cross-Examination

By Mr. Dougherty:

For this investment, that is only about 10% on that investment. I mean 10% on the entire amount on that investment. On the entire amount of rent it would be better, but when you get a week or a month or 2 months, it is not so good, and you take that into consideration at the time you rent the machine. I have been working for Culjak and

(Testimony of Pat Devine.)

Zelko since 1927. I did not work for anybody else, but I did not work steady. I was mining for a couple of years. I knew they had no work for a couple of years. I was ill 3 or 4 years. I did not work for them then, but I did come down and go over that machine and see that it was in good shape. I was not paid for that. I had nothing to do and I liked to go down and look it over.

I was interested in the partnership when they first purchased the machine. I did not sell my interest. I still have [60] it. So, I am a partner in the machine, but not in all jobs. I have no profits in the machine because before, when I was sick, I was not there and did not derive any profits.

I testified that I operated the machine at Long Ridge for about 2 days. We had that machine there about 10 days, but we moved it from there over to Magnolia Street where it was about 6 or 7 days. We moved back to Long Ridge again on June 30th. We were there several days, but it was only about 1500 feet operation. We were there several days, but there was a lot of work, house connections and cleaning up streets, and then we moved it back to Long Ridge and operated it there from June 30 to July 2nd. We did not operate it every day. We took it from the Long Ridge job to their warehouse, the Culjak and Zelko lot.

As to those cracks in these exhibits you call my attention to, and as to whether they are weather cracks or dry rot, it looks to me like it is squashed. This crack here at this end would be caused from a

(Testimony of Pat Devine.)

tight bolt or weather check. It is not more likely that this came out here from a tight bolt; it came from a rock that got jammed in here and busted that out. A rock got caught here and burned the whole thing up. All of those are rock bulges.

There was a bolt in there the same as that here. I say this is a rock bulge. The bolt isn't that tight. The cantilever comes over here and the whole weight of the machine is here. This track is $9\frac{1}{2}$ pounds to the square inch when the whole track is on the ground. You have the 40 ton weight right on this point or on this point.

From about 1931 to 1938 this machine done one little job out in North Hollywood. I have forgotten the street. That job was about 15 days. I think it was about in 1935 or 1936. That was not the last job before it went to Fort Huachuca. In [61] 1938 we went to Tehachapi in Kern County. It was digging sewer trenches up there in the city. There was no rock there at all, just soft soil. That took about 21 days. That is about 125 miles from Los Angeles and was in 1938. That was the only job before it went to Fort Huachuca.

From the time the machine returned from Fort Huachuca until August 28, 1941, I made minor repairs. I repaired the conveyor chains. I took out twisted links and put in new ones. I replaced maybe 25 links. We had those links in the warehouse. I put them in at Long Ridge on the first trip there. They are different links. I did not put in any chain links such as you are referring to here.

(Testimony of Pat Devine.)

I put none of such links in at Magnolia or Long Ridge. The weight of the machine is 40 tons.

The man in Los Angeles who wanted to rent the machine is Mr. Nottingham. That was when we were putting in the new pads in September of 1941. He wanted to go to San Diego with it. He just casually inquired and I told him to call up Mr. Culjak. He did not say what he would do with it or how long he wanted it, just a casual conversation.

When we shipped this machine to Fort Huachuca, we took a pad out of each side. When they make them up new you can't tell whether they have too much slack, maybe sometimes there is an inch or so play and they may put in an extra pad, and in time you can take that out and take up the slack. That does not indicate considerable wear because there was a lot of slack to start with, but you can't connect it when they are new.

Redirect Examination

By Mr. Jones:

No part of that damaged condition to those pads or to the links was due to our work in California. Neither was the condition of the idler shaft. In my opinion, that condition was all [62] due to the work at Fort Huachuca.

TESTIMONY OF FRANK J. BARRY

Direct Examination

By Mr. Jones:

My name is Frank J. Barry. I am a practicing lawyer in Los Angeles and have been for 20 years. To the best of my recollection and from records which I hold in my hands, Mr. Culjak of the firm of Culjak and Zelko first consulted me with reference to this trenching machine and its rental to the defendants on July 8th, 1941. I wrote a letter on July 8, 1941 on their behalf to Del E. Webb Construction Company and White and Miller. I have a copy of that letter. (There being no objection, said copy of letter was marked in evidence as plaintiffs' Exhibit No. 3 and reads as follows:

July 8, '41

Del E. Webb Construction Co. and
White & Miller Contractors, Inc.
Fort Huachuca, Arizona

Gentlemen

Re: Culjak & Zelko v. Webb et al.

Mr. Martin Culjak of the firm of Culjak & Zelko has retained me to obtain an adjustment of their claim for damages to their trenching machine which they leased to you, said damages being the result of failure on your part to make necessary field repairs of damaged parts, which damaged parts resulted from unusual hard usage of the machine while operated by you.

Mr. Culjak has submitted to me the contract of lease and all correspondence with reference to same,

(Testimony of Frank J. Barry.)

and after a careful study of the entire situation I cannot see how the lessee can escape liability for making necessary field [63] repairs on the machine and returning the machine in as good condition as when received, ordinary wear and tear excepted. I am unable to convince myself that the damage to the machine is the result of ordinary wear and tear.

I feel certain when you have carefully analyzed and considered this matter you will recognize the reasonableness of the claim of Culjak and Zelko. I am sure also that you realize that it is no valid defense to their claim to say that the rental paid for the machine was high enough to cover the replacements which are now necessary.

I shall expect to have a reply within ten days so that I may determine what further action, if any, I should recommend to my clients.

Very truly yours,

FRANK J. BARRY)

fjb/jr

The Witness (Continuing): I did not receive any reply to that letter. I have a recollection independent of the record of what transpired at that time and thereafter, and the record assists me also in the matter. My recollection is that on the occasion of the conference of July 8th, it was concluded that it would be best to give the defendants an opportunity to repair this machine themselves rather than to have the plaintiffs repair the machine, and

(Testimony of Frank J. Barry.)

so, as shown in that letter of July 8th they were requested to let us know within 10 days whether they would repair the machine. That would bring the date up to the 18th of July.

I got no reply to that letter of July 8th. I received a letter of July 28th, 1941 from Mr. Collins, and that refreshes [64] my memory so that I can state that on July 26, 1941, which was Saturday, Mr. Culjak and Mr. Collins both called at my office and at that time, there was a discussion with reference to the repairs of the machine and, since more than 10 days had expired since the date of my letter of July 8th, I advised there was nothing else they could do but to make the repairs themselves, and on that date Mr. Culjak, on my advice, gave an order to Mr. Collins for 150 excavator chain links and 82 multiple slats with bolts and link pins, and then two days later on Monday, July 28th, Mr. Collins wrote me confirming the verbal order and enclosed a copy of the order for these materials.

This is the order that Mr. Collins put in on the 28th of July. (Thereupon, a letter with a copy of an order attached was marked in evidence as Plaintiff's Exhibit No. 4.) When later they had done this repair work, I referred the matter to Conner and Jones, in Tucson, who took the matter up after that and they brought in the Federal Court here.

(Testimony of Frank J. Barry.)

PLAINTIFF'S EXHIBIT No. 4

Los Angeles, Calif.

July 28, 1941

Mr. F. J. Barry
448 South Hill St.
Los Angeles, California

Dear Sir:

Enclosed please find a copy of the order which I have entered for Martin Culjak in accordance with his verbal instructions in your office Saturday.

If it is necessary for you to have an invoice to make your claim covering these items, I would be very glad to issue one to you.

I'm also enclosing the letters relating to the deal of Del E. Webb Construction Co. and White & Miller Contractors, Inc.

Very truly yours,

HARRY C COLLINS

Harry C. Collins

HCC/M
Encl.

Los Angeles, Calif.

July 28, 1941

Mr. Martin Culjak
1354 South Bonnie Beach Place
Los Angeles, California

Dear Sir:

In accordance with your verbal instructions, I have entered your order for the following parts for

(Testimony of Frank J. Barry.)

the Model 500 Austin Trench Machine, Serial #11304:

150 TE 261 Manganese Excavator
Chain Links assembled with
pins and bushing

Price\$4.90 ea. \$ 735.00

82 TK 271-1 Multipedal Slats with
bolts and link pins

Price\$14.20 ea. 1164.40

Total\$1899.40

Above price is plus sales tax.

Terms: 2% Cash—10 days

I can make immediate delivery on the 150 links of chain and it would take three weeks delivery on the multipedal slats.

Kindly sign one copy of this agreement which will constitute your order, and keep one for your own files.

Very truly yours,

HARRY C COLLINS

Harry C. Collins

Accepted July, 1941

.....

.....

[Endorsed]: Filed June 17, 1943.

Cross-Examination

By Mr. Dougherty:

July 26th is the day we had the conference and the verbal order was entered on that date.

(Testimony of Frank J. Barry.)

Mr. Jones: That is the plaintiff's case, if the Court please.

Mr. Dougherty: Your Honor, the evidence on the part of the defendants mostly consists of the deposition taken in Los Angeles, and I presume we can arrange to read that before the Court at this time.

Thereupon, the deposition of Harry C. Collins, taken on behalf of the defendants, on May 9, 1942, in Los Angeles, California, was read.

TESTIMONY OF HARRY C. COLLINS [65]

Direct Examination

By Mr. Jewell:

My home residence is 1516 Fourth Avenue, Los Angeles, California. My business address is 2421 East 57th Street, Los Angeles, California. I am an engineer, manufacturers' agent and dealer in heavy construction equipment, particularly, trenching machines, for digging trenches for sewer work and water lines, utilities; locomotives, either Diesel or gasoline, for road work, rock crushing and screening plants, designing of gravel and screening plants and general line of machinery for construction of dams, and so forth. I represent the Austin Machinery Corporation, Muskegon, Michigan, manufacturers of the Austin trench machine. I also represent Fate-Root Heath Company, of Plymouth, Ohio. The nature of my business is that

(Testimony of Harry C. Collins.)

of a manufacturers' representative for various machinery companies.

I sell the equipment manufactured by the various companies to the contractors direct from the manufacturer. They do the billing and they pay me a commission. I do no other work for these companies except selling repair parts and keeping the machine in order. I act as consultant with respect to repair work that is done on machines sold by these various manufacturing corporations. That consulting work is the type of work I referred to when I said I was an engineer and salesman for various machinery corporations.

I am acquainted with the plaintiffs in this action. I am familiar with the trenching machine owned by them and more particularly described as Model BE-Type C-Style 500 Machine No. 11346, being a ladder type machine manufactured by Austin Manufacturing Company, Muskegan, Michigan.

I originally sold that machine to the present owner. It is pretty hard to state definitely when the sale was made. [66] 1930 would be about right. From December, 1940 to April, 1941 that machine was at Fort Huachuca, Arizona, digging trenches for utilities for the Fort Huachuca camp under a contract held by Del E. Webb Construction Company and White & Miller, Contractors, Inc. To my knowledge, the machine was rented by the plaintiffs to the defendants.

I have seen this machine many times with the thought of renting it from Culjak & Zelko, but I

(Testimony of Harry C. Collins.)

can't say the exact date as to the time it was shipped over there. I would say that I had seen the machine 3 or 4 times during the year 1940, and that the last time I saw it was within 30 days prior to the time it went to Arizona.

I had occasion to inspect the machine after it was brought back from Arizona. I would have to refresh my memory a little bit as to when it was brought back from Arizona.

Mr. Jones: It is stipulated that it was the latter part of April.

(Testimony continued): I inspected the machine after it came back from Arizona between the 10th and 15th of May. It was returned from Arizona some time prior to the 10th or 15th of May. I do know the dates.

The machine was in Van Nuys when I inspected it. The exact street I do not know. It was on a job out there. The first time I saw the machine after it returned from Arizona was when I made the inspection at the request of Del Webb Construction Company. The request was made by telephone with the instruction to look the machine over and report to him the condition and necessary parts to put it in working condition, supposedly the same condition as when it left here.

I do not know the condition it was in at the exact time it left here, only that I had seen it previously and it was [67] in first class condition at that time. I knew that the parts were all in perfect condition because I had been selling those parts to keep it up

(Testimony of Harry C. Collins.)

in shape. I talked to Mr. E. G. Shaber regarding my instructions as to the inspection of the machine. He was the officer manager of Del Webb Construction Company, and White and Miller, Contractors, Inc. He told me that there was some question as to the operating condition of the machine after it was returned here to Los Angeles, and as the representative of the Austin Trencher, if I would go and make an inspection and report to him what parts were necessary to put the machine in first-class operating condition.

I made such inspection out at Van Nuys. It was not working at the time; it was on a Sunday. The work was only 50 feet; just had got the machine set to work. Just probably a couple of hours work. I did not see the machine operate at Van Nuys. I did not see the machine again after that Sunday at Van Nuys. I have not to this date seen the machine again.

I do not know whether or not the construction job that was being worked on at Van Nuys was completed by this machine. This inspection took me about one hour. I found the track pads which carry the machine and guide it along the ground badly bent, the wood parts were broken down and the steel casing over it had heavy indentures, putting them out of shape, and in my opinion, pads in that condition would not run true because they are made for that purpose of running this trencher in a direct line. Then I inspected each and every

(Testimony of Harry C. Collins.)

link, what we call the excavating chain links, and found them bent in places and stretched out of pitch. By the word "pitch", I mean there is a certain center between where the links connect that go over a sprocket and unless they are perfect, they ride on top of the sprocket teeth and the chain will jump off and break them. The [68] machine is propelled by means of 2 approximately 10 foot Caterpillar treads made up of approximately 82 pads, each pad being linked with the others by means of coupling links, with which the sprocket meshes and each of these ads is made up of wood covered by steel and each pad is approximately 5 inches by 6 inches by 24.

My examination found that the surface of these pads which is exposed to the road or earth, was indented at irregular points on each tread. The excavator chain links were bent and pulled out of pitch.

The excavator chain is made up of heavy manganese steel links with 10 inch centers, overall links about 14 inches, and each link held together with a manganese pin $1\frac{1}{4}$ inch in diameter. This link is a web construction link with a center open so that it will go over the top of the chain. This excavator chain was pulled out of pitch.

The pitch represents the distance between the point on the chain where the pin connects with each member of the chain, which enables this chain to engage sprockets that are made with a pitched center or identical distances.

(Testimony of Harry C. Collins.)

What I mean by pitch with respect to this excavator chain is that each link of the chain is the same length so each of the other links of the chain will mesh properly with each tooth on the sprocket.

When I say "it", meaning the excavator chain, was out of pitch, I mean that some of the links of the chain have been elongated so that they do not mesh with the teeth on the sprocket. This elongation of the links manifests itself in two forms, namely, where the manganese body of the link itself has been stretched, and where the holes of the couplings have been worn so that there is an elongation. Manganese steel will stretch [69] under great stress.

In addition to the difficulty with the tractor tread pads and with the pitch of the excavator chain, there were other minor parts that I considered had usual wear and tear and I did not make any report on them. For example, the idler rolls that the chain rolls on while it is in operation, were badly worn. The idler rolls are rolls that guide the chain and support it through the length of the boom. There are 6 top idlers and 4 lower idlers on the boom.

My inspection did not result in the discovery of anything else wrong besides the pads of the treads, the excavator chain links, and the idler shafts, nothing that I can say that would be considered more than usual wear and tear.

(Testimony of Harry C. Collins.)

We know about what usual wear and tear is when it gets on a job, and when it is beyond that point, or when it has weakened it or broken it, then it comes under what we call a major repair or major replacement.

I made a report to Del Webb Construction Company under date of May 12th, which is as follows:

“May 12, 1941.

Del E. Webb Construction Co. and
White & Miller Contractors, Inc.,
Fort Huachuca, Arizona.

Attention: Dale E. Griffith
Purchasing Agent

Gentlemen:

At your request I made an inspection of the Model 500 Culjak trencher. There were 102 excavating chain links that were bent, drawn out of shape, or worn down to a point where they were dangerous to operate. I believe that they should be recompensed for this amount. [70] There were 150 links in the line originally which leaves 48 good ones. Mr. Culjak conferred with me on this and he thinks all of the links should be replaced as it would be very expensive to take the chain apart, sort out the bad links and put in the new ones. Naturally, it is up to you to make the final decision on this.

I have found that the 82 tractor pads are all in very poor condition. The ground is so rocky that the covering of wood slats are bent to such

(Testimony of Harry C. Collins.)

a point that rocks and other material get between the slats and do considerable damage to his machine. There is no way to repair these, as to remove, straighten and replace the pads would be more expensive than to give them a new set complete. The costs of these are \$14.10 each, f. o. b. our Los Angeles warehouse. It is very evident that the hard, rocky ground over which the machine has run is responsible for the condition it is in. In my judgment this could not be considered as normal wear and tear as these pads usually last for years. When they left here they were in first-class condition.

Trusting that this information will be of service to you in making your settlement, I am,

Very truly yours,

HARRY C. COLLINS"

When Mr. Shaber, representing the defendants, called me on the telephone, he asked me if I would go and make an inspection of the Culjak Model 500 Trencher which they had used at Fort Huachuca and make a report to him within the next two or three days. Sunday, which was the first day I had available, I went out and made that inspection. Mr. Shaber asked that I send them a letter reporting my findings. The letter has previously [71] been incorporated into the record as my report. I knew Mr. Shaber previously through conversations for

(Testimony of Harry C. Collins.)

about 7 months on this particular job, because when the job was first started that is when I commenced to send parts over to them, I knew that he was then representing the Del Webb Construction Company.

I can not give the exact dates when it was prior to December 1940 when this machine went over to the project in Arizona that I sold any parts or equipment for use for its repair or replacement. I would say about once every month they would buy something like a clutch would go out, but none of these parts that I have later sold to them, none of these major parts. It has been a long time, it has been practically a year. It is pretty hard for me to give the date that they purchased any of these chain links for the excavator chain because it is hard to separate just the chain links because they would buy just the parts like a shaft or a clutch, but it would be some time, probably 7 or 8 months or a year before they had previously bought any chain links.

I do not recollect of *every* selling them any pads for the caterpillar tread. It is hard to give any date when I sold them any idler rolls, but it is within the period of a year that they would take an idler roll because they wear, you know, about once a year.

The parts used to repair this machine while it was on the job over in Arizona and also immediately after it was taken off the job and before it was returned here were purchased from me.

(Testimony of Harry C. Collins.)

All those parts, it is a cost-plus part, were bought by Del Webb Construction Company. They bought and paid for the parts that were used in making repairs while the machine was on the operation.

[72]

The plaintiffs didn't buy any parts from me to repair this machine from December, 1940 until they made this purchase on July 8, 1941, but the user, the contractors, the defendants did.

On July 8, 1941, the plaintiffs ordered, through me, 82 multi-pedal slats and bolts, 2 idler shafts, 150 excavator chain steel links. The price paid by plaintiffs for the 82 multi-pedal slats and bolts was \$14.20, \$1164.40 for the slats, plus sales tax. The total is \$1199.33.

I haven't the prices here for the 2 idler shafts because that was on a separate order. The price paid for the 150 excavator chain links was \$4.90 each or a total of \$735.00, plus the sales tax, which would be \$757.05. After a link is spent or stretched to a point where it should be taken off, it is absolutely a complete loss, and has no salvage value except for scrap, about two cents a pound or about \$10.00 a ton.

Mr. Dougherty: That figure ten should be changed to forty. It should read forty dollars a ton.

Witness (Continuing): When I made my inspection between May 10th and May 15th, at Mr. Shaber's request, I measured the links because that was the only way I could tell they were stretched. I would see a link that was bent and oblong in shape,

(Testimony of Harry C. Collins.)

and then I knew right away. A stretch as much as three-eighths of an inch makes it practically useless as a rule. The center of those links, or pitch as we call it, is 10 inches, and when it gets to 10 and three-eighths or 10 and a half, we know it is dangerous to operate.

We don't have to measure them to see that they are bent, but you have to measure them to see if they are stretched. The ones that are bent you know are stretched, or they would not [73] be that way, because if they weren't bent to a point where you didn't think they were useful, the only thing to do is to go and measure them. Sometimes, the ones that are stretched are bent and sometimes they are not. It is what we call—it isn't bent in this way, it is the edge of it that is bent down where it weakens it. In other words, where it has got pressure on the top of it, that gives it this bending which makes it just as dangerous as in elongation.

When I made my inspection, I found that 102 of them should be replaced. There were 150 all together—but 102 of them was what I figured would be dangerous. I didn't ever measure or inspect this machine prior to the time it went over to Arizona. They generally do that themselves.

I do not know whether any of those links or the pads were bad prior to the time it went over to Arizona. I do know this, that when the machine is sent out they generally have a surplus of links there, and when they find a bad one, especially on rental, they take and replace those links. They

(Testimony of Harry C. Collins.)

don't get any pay when it is not running and they take ordinary care to put it in shape. Whether they did that or not, I don't know, but that is ordinary custom. After they put on the 82 new tractor pads and the 102 new links, that portion of the machine would be nearly new, but that doesn't affect the shafts which are liable to be crystalized, when you can't tell, or it might be the gears or pinions that might be worn. All those parts—but the biggest cost of the repairing is what we call a major repair, and this is a major repair.

I kept those links here in Los Angeles. I generally carry a complete set, sometimes more than that. And the same is true with respect to my supply of tractor pads.

Cross Examination [74]

By Mr. Barry:

Q. You stated that this was a major repair, the installation of these multi-pedal slats with bolts and link pins and 150 manganese excavator chain links, they were constituted a major repair, is that right?

A. Well, taking the word "major" what I mean is that it is the most costly part of the machine. There are two ways of making a major repair. I would say about 30 days prior to the month of December, 1940, when this machine was rented to Del Webb Construction Company, I had been over to see it. I had a prospect of renting it. That would be about the month of November, 1940. I have been trying for many months to dispose of it

(Testimony of Harry C. Collins.)

because there is no work for it for a good many years here, and I had inspected it during that period for the prospective buyers.

When I inspected it on or about November, 1940, I found the machine in what I would call first-class condition throughout. I would say that on or about November 1940, the tractor pads were in first-class condition. They showed no appreciable wear. I stated on direct examination, however, that I did not make an inspection of this machine prior to its leaving for Arizona on this Fort Huachuca job. I did not make any inspection for that particular job, but I made an inspection about 30 days previously upon a prospective lease to other parties, and for purchase, and at that time, I found it in first-class condition, and that was true as to the track pads and also as to the excavator chain links, and so forth, the buckets and gears and the engine had been just overhauled. I verified that. The engine had been, I believe, rebored by a local concern here.

I am an engineer and most of my life has been devoted to dealing in machinery of this character. I have been engaged in that kind of work about 40 or 45 years. I am 71 and I have [75] been 46 years in the machinery business. I was 10 years as representative and engineer for the Allis Chalmers Company. We there had crushing and cement machinery, rock crushing machinery, screening equipment and mining equipment, and all their general lines in electrical and steam. We put in complete plants and I had to know it all. That is all heavy

(Testimony of Harry C. Collins.)

machinery. That was my first experience as an engineer of that character.

Then I worked for my self following the same lines as manufacturers' agent for heavy machinery, and as a dealer, and I have been continually for the past 46 years engaged in this heavy machinery business as a dealer and engineer.

In that connection, I have been selling machinery, designing plants of different kinds, looking after the construction in some instances, servicing them in the way of repairs, examining used equipment for sale for other people, and making estimates and appraisals of machinery.

I think I can name a good many firms for whom I have been consultant during that period in the engineering line. Most every rock company in the southern part and northern part of California. There is the Union Rock Company. It is out of business now; but I was with John Gregg Company; Fenton Material Company, San Diego; George Daly construction Company of San Diego; V. R. Dennis Construction, San Diego—there are so many. Those are the major ones. There are a lot of smaller ones. The Imperial Valley Highway, I put in plants for them.

I serviced the Metropolitan Water District, sold them machinery, and advised on a lot of equipment there for the life of the job, 5 years. That is the big construction of the aqueduct from the Colorado River into Los Angeles and most of the dams here, like the Pine Creek Dam, the Don Pedro Dam. I [76] installed most all of their ma-

(Testimony of Harry C. Collins.)

chinery up there. That is the repair material for the good of the dam. Then, Bent Brothers, of Los Angeles, Griffith & Company. Those are some of the leading people.

This machinery was sold by me to the plaintiffs in the neighborhood of 1930. It is pretty hard to say what is the life of a machine of that character. There are some that I sold 20 years ago that are still going, if they keep it up. Twenty years would be a reasonable life of a machine of that kind.

When I inspected this machine, I recommended to Del Webb Company, the defendant, that it should have 102 excavator chain links installed. I did not afterwards make a different recommendation to the plaintiffs in the case with reference to the number of links that ought to be installed, that is, changing it from 102 to 150.

The reason for installing more than I recommended as necessary was that I am always anxious to see a machine operating successfully, and I know that it would not give the best results where you get some poor links and a lot of new ones, and the labor of making that change very often will save the amount of links that you would put in. I would say that it would be very nearly as costly for the plaintiffs to have installed only 102 links as to install a complete chain of 150 links. There would be very little difference. The 48 links which I considered were good enough to remain on the machine and which were taken off and replaced by new links were of no value to anybody excepting the man who

(Testimony of Harry C. Collins.)

owned the machine for an emergency repair. They were not salable, except at scrap prices. I do not know what became of those 48 links that were more or less in fair condition. They were not taken back by me. I got none of the material that was taken off the excavator chain nor the multi-pedal slats. I do [77] not know what became of that material.

As to the reasonableness of installing the 150 excavator chain links instead of 102, as I first recommended, when I recommended 102 links with the machine working on the type of ground that we use here in California, I was of the conclusion that the others were strong enough, they did not show any defective pitch, but they did show wear. In other words, I could only find 102 that were out of line and also that were bent. The other 48 did not show that, but they showed some wear and would not last naturally as long as the new links.

If this machine had been repaired with 102 links as I recommended in my report to the defendants, the machine then would have been in as good condition, insofar as the excavator chain was concerned, as when I inspected it in November, 1940, ordinary wear and tear excepted.

It is pretty hard to say in dollars and cents what saving would there have been in the cost of the repair of the excavator chain if 102 links had been installed in lieu of 150, but in round figures, I would say that you would have a little more than half the cost of putting in new links. In other words, half the cost of the 48 links, costing \$4.90 each, that

(Testimony of Harry C. Collins.)

would be a saving of \$117.66, plus the sales tax on \$117.66.

As to whether it is a usual thing to find a machine of this character developing so much damage in such a period of time as between December and April, everything depends upon the ground in which it is working. Certain soils, even a sandy soil, will wear out the chain as quick as hard material, because the grit gets into your pins and wears them out. They use these machines in all classes of work. I never have seen them used in quite the character over in Arizona, because I have noticed quite a few times on this job—not when this Culjak machine was there, [78] but a previous machine—and we had the same thing in San Diego, which is a very similar ground to work down there, and as a rule the owners of these machines do not like to send them down to San Diego because they realize that there is a lot of damage done to the machine that isn't seen on the surface, such as crystallizing the shafts, which is a very expensive part of the trencher machine.

It is a pretty hard question for me to say whether the condition of this machine at the time I inspected it at the request of Mr. Shaber was a condition resulting from ordinary wear and tear. I would say that looking at the machine, when I looked at it in Van Nuys, outside of the tracks and the chain, it was in just as good a condition as it was when I made an inspection with the idea of selling or renting it 30 days previous.

(Testimony of Harry C. Collins.)

Confining ourselves to the tracks and the chain, I would say that the deterioration or damage was in excess of ordinary wear and tear, but the work that they did on it over there to put it in shape overcame the difference between ordinary wear and tear and excessive wear and tear. That is the part outside of the Cats and others. In other words, they *brought* enough parts to put that machine in as good a shape when it left over there as it was when it left here. It is my opinion, that it was in as good condition as it was when I inspected it about 30 days prior to leaving for Arizona with the exception of the cats and the chains, the cat being the pad and the chain.

Contrasting the condition in which I found the cats and the chain on the occasion of my inspection of them at the request of Mr. Shaber at Van Nuys, with the condition in which I found the cats and the chain when I made an inspection of the machine 30 days prior to its going to Arizona, I would say that the deterioration or usability of the cats and the chain was due to the [79] extraordinary conditions under which it was operated.

The failure on the part of the person operating one of those machines to replace reasonably as soon as the defect appears a defective link, say, in the excavator chain, has the effect that it would serve to break or elongate the other links. As a matter of fact, one defective link tends to put out of alignment and destroy the symmetry of the entire chain. You might have serious trouble for failing to do a

(Testimony of Harry C. Collins.)

very small thing in these machines. I will say this though, that those people over there have 30 or 40 new links always on hand, and if the operators when they found a weak link had put it in where it would belong, why a lot of trouble, unusual trouble, would have been eliminated. I couldn't say whether they failed or not to put in these links. I know they had them on hand. I wasn't there to see it. I know they ordered them. They had extra links ordered there all the time. I don't think they had sufficient on hand to supply four or five every day during the time the job was going. That would be a very much exaggerated condition. They had enough links to take care of, I believe, the wear and tear that they were subject to over there if the operators would install them when they found these links were getting weak and jumping the sprockets.

Q. Well, for your information, and in order that you may give your opinion accordingly, Mr. Brownfield testified that they installed as many as 6 in a day, and 4 or 5 frequently.

A. I don't think it could be possible for them to do that every day with the amount of links they had on hand. I don't think it would be possible under any condition for that to happen on a machine even in that hard country.

I inspected those track pads. In my opinion, the reason for the damage to those track pads was going over uneven [80] ground with parts projecting with the weight of the machine on top of it.

The machine could be operated without having

(Testimony of Harry C. Collins.)

made the repairs on the track pads that I recommended, but I would say that under a disadvantage on account of not running true. All indications in my experience would show that when track pads get out of line and get indentures in them to such a point that one side is high and the other low, in other words, flattened down on account of the wood breaking, you can't get a true carriage, and you have got a tilting which throws the machine one way or the other. I don't know whether that would affect any other part of the machine with the exception that it would mean that they would not be able to run a true line, and I believe that would cause the work accomplished by the machine to be more expensive than if it did run a true line. It would mean that they would have to either straighten up the ditch or back their machine up and get it in line with the line laid down by the engineer.

I think it was absolutely essential to have the repairs which I recommended done on that portion of the machine with respect to the excavator chain if they wanted to make footage and get away from jumping of the chain on the sprockets or breaking of links, which would shut down the work. I believe the machine could have been operated under disadvantage without having had the repairs that I recommended. The disadvantage would consist of loss of time, breakage of parts due to unusual strains and so on.

Here is what happens on a link of a chain on a bucket like that. If it goes over you get a jar like

(Testimony of Harry C. Collins.)

that and a jar comes on a heavy head shaft where these sprockets are placed on, and those continually being jarred crystallize that shaft and they break off right near the point where those sprockets are put [81] on. When that happens your machine is out of commission until you can either have one made or you can get a new one. We don't carry, as a rule, that particular shaft in stock.

I don't believe it takes more power to operate a defective machine because we have ample. You can only get so much power out of it anyhow. The only thing I would say that would happen is that it has a tendency to damage all the rest of the parts of the machine that are immediately affected by the excavator chain, and if a chain breaks sufficient to drop the bucket line down, it is liable to break a bucket, or it is liable to break an idler roll, or liable to break an idler shaft. The hardest part of the machine, working part, is the bucket line. The other parts we don't have very much trouble with excepting a few little—just the wearing parts which are very inexpensive, such as jaw clutches. I don't think the excavator chain would have anything to do with running a true line. It is the multipedal pads that do that.

Redirect Examination

By Mr. Jewell: When I made this inspection prior to December, 1940, for the purpose of selling or renting this machine, I did not measure these links. They didn't show any unusual wear that the purchaser would raise any objection to buying. I

(Testimony of Harry C. Collins.)

didn't notice any of the links bent at that time. The terrain down around San Diego that I have referred to, is the roughest in the State of California, outside of San Luis Obispo. That over there is called conglomerate, mixed in with cemented material, and in that is boulders ranging from 3 inches up to, I would say, 24 inches, and you never know where they come. In digging a ditch you come down and this boulder might be off on this side of the ditch 10 inches, and 10 inches in here, and there is no way of getting it [82] out unless you shoot it out because you can't dig it. And when you get down to the bottom of the ditch you will find several of those running the full width of the ditch. It is very hard cemented material. If it was just cemented material, it isn't so bad because you have always a little something to get a purchase on.

These trenching machines operate all over the world. I wouldn't say that it is an improper use to use this type of machine on terrain of the type located at Fort Huachuca, if the ground is properly prepared and shot. In other words, what we call shooting by dynamite, putting the holes down. And a great deal depends on how they put the holes down. It is just a question of a good powder man. If they put them 5 feet apart, it is no use. If they stagger them 3 feet here and 3 feet here, it breaks them up so that there is enough loose stuff for the buckets to get ahold of. The only damage it will do to the machine is by continuing vibration every time one of those rocks is hit. That shock goes all through

(Testimony of Harry C. Collins.)

the machine. The operator with his levers can tell whether his bucket is striking a loose rock or a hard rock, and he immediately lets up on that and simply siggles, which he can do, slowly to get the bucket going. I would say that the use of this machine on this type of terrain is not improper, but it isn't—I will qualify it again and say again that it is not improper if it is properly prepared. It is absolutely improper for any attempt to use it if they don't prepare the ground so that they can dig it. The use of this tye of machine with proper blasting is not unusual even on terrain like at Fort Huachuca. We do it.

The reasonable price for the renting of this equipment for a machine of this size and what it costs, the money invested, is about 10% per month of the cost of the machine, which would [83] make it \$1600.00 per month. That is how all this rental is based on. A machine that will dig 16 to 20 feet deep and 52 inches wide, which this machine will do, is always rented, to my knowledge, at \$1600.00 single shift, 8 hours, and \$800.00 for the second shift per month. That is supposed to represent, in the trade, 10% of the cost of the equipment new.

The cost of this machine new with the attachments taken on there is in the neighborhood of \$16,000.00 or \$17,000.00. Another thing enters into the rental and that is the length of time. If a man puts a machine out for a month he wouldn't even rent it at that price. The engine condition or the condition when it comes back might be such that you

(Testimony of Harry C. Collins.)

would spend all of your rental to put it in shape, so you can rent it to somebody else, so there isn't much profit to the renter.

The lessee pays the transportation from the day it leaves until the day it is returned to the point of its origin. That is the standard on all kinds of equipment, not only with trenching equipment but everything else.

A while ago, I stated that I considered 20 years a reasonable life of equipment such as this. I base that on this here: A trench machine isn't run every day of the year, and we figure a 20 year life. It is not 20 years of actual operation, but 20 years from the time it was bought until the termination of that particular time. The average machine runs about 10 years in 20, but we take it, if a man wants to buy a piece of equipment, the first thing he asks is, "When was that bought?" When I say that this was bought in 1920, that makes it 20 years old.

The life of a piece of equipment of this type, if it were in daily use, depends on the owner. If he takes care of it and doesn't let the piece of equipment when it gets weak wear out and break, that is one condition of life. If he keeps it greased [84] up, keeps his engine in good shape, and replaces a shaft when it shows a weakness, or puts a gear in when it is worn down to a point where it should be replaced, they will last, I will say, indefinitely, or they ill last for 20 years even in actual operation with proper care. But with the operation that they generally get on these machines, about 10 years

(Testimony of Harry C. Collins.)

would be the life of one, 10 years of actual operation.

I would say that the ordinary life expectancy of a piece of this type of equipment that was being rented out would be 10 years of actual operation. As to what I mean by proper care, here is what it starts from: First, a poor operator that doesn't know how to operate the machine. In other words, he speeds it up and doesn't take advantage of the condition of the ground which he is in. Another is that he will try to do more than the machine is built for. If it is built for 15 feet, he goes down to 20 or 25. I mean by proper care a replacement of parts as they wear out.

Referring specifically to these links of these chains, the links of the chains wouldn't have much bearing on the life of the machine. It is the life of the machine as I place it, the life of the shafts, the life of gears, the life of sprockets and the life of the engine. You understand, the chain on there they keep on wearing out and being replaced. That is anticipated in all machines of that kind. They all operate under the same conditions.

With respect to the links of these excavator chains, it is not anticipated that they wear out and are replaced many times during the life of the machine. I have had machines here that chains have been on there, on ordinary going, around 2 or 3 years. Some wear out more quickly according to the ground it is in. If it is a harder ground they wear out a good deal faster [85] because you have a

(Testimony of Harry C. Collins.)

strain on it, but if it is a soft ground they naturally last a good deal longer. There is another case of an operator. Get a poor operator in them and they can tear them to pieces very quickly, because if they get caught in a snag instead of levering they will put the power on there. They have got tremendous power on there and they can pull anything apart.

With respect to the pads of the treads, I don't think it is anticipated that they will wear out and be replaced before the life expectancy of the machine is completely utilized. I would say that the average machine of this type with average use that they would have, would wear out in 10 years about 2 sets of tractor pads.

I wouldn't say that the tractor pads coming as original equipment on the trenching machine with ordinary reasonable use should last as long as the life of the tractor. I would say it would be anyway 75% of the life of the tractor, that they would be good for.

I would say that the life of these excavator links, if it is subject to ordinary reasonable use would be about one-third of the life of the machine, with proper care and no unusual conditions being used. As a rule, these trenchers are made for a place like around Los Angeles, or ground where it isn't hard, and you don't find as a rule, only under the conditions as they exist today, where they attempt to put sewers in the hard ground, excepting in San Diego or some of these cantonments, or places where they have to have a good sewer system.

(Testimony of Harry C. Collins.)

Recross Examination

By Mr. Barry: The character of the ground upon which a machine is to be used under a rental contract does not to a very great extent have any affect upon the reasonable rental which is charged for [86] such machine. We base a rental on whether it is used on soft ground or hard ground. That is the way it generally goes. But here is another condition: If a machine goes far away, where the owner can't make a personal supervision on it, he asks a little more for it, and everybody figures he is entitled to more than if it was right close where he could see if they would abuse it. That is the way rentals are based.

All these parts which are recommended to be used upon the machine were not available in Los Angeles at the time. The track pads had to be made. They had to be made here in Los Angeles. I think it took nearly 30 days between the time they got the order and the time delivery was made. I had a certain portion of these in stock, but I didn't have sufficient to make the whole chain and you couldn't start doing anything unless you had everything on the ground. The same thing applies with chain. I happened at the time not to have a sufficient chain to make a complete set. The repairs could have been done in 40 days.

The prices charged by me for these materials that I sold for the repair of this machine are the standard price which we charge everybody. It is estab-

(Testimony of Harry C. Collins.)

lished by the factory. It is the reasonable price charged in this community for such a pad.

Redirect Examination

By Mr. Jewell: It wasn't until July 28, 1941 that an order for tractor pads or links was placed with me. On August 28th we billed it, and we bill as soon as the stuff is delivered. At any time subsequent to the middle of May 1941, and prior to July, it would have taken approximately 30 days to get the tractor pads and other links unless they caught me with a surplus of stock.

DEPOSITION OF WARD A. BROWNFIELD
a witness for defendants.

Direct Examination [87]

By Mr. Jewell: My address is 429 San Pascual, Alhambra. I am familiar with the trenching machine in this case. I was the operator of the machine at Fort Huachuca. It was on 2 shifts. I was on the day shift and they run a night shift too. I was the first operator to operate the machine after it was delivered at that project. I have been working on equipment of this type since 1925 as an operator. Since 1925, I have done work in repairing this type of equipment.

The machine was in very good shape at the time it was delivered to the project. Those pads on the Caterpillar treads were in pretty good shape. Of course, the ends of the wood was checked a little bit,

(Deposition of Ward A. Brownfield.)

but outside of that the track was in very good shape.

I think there were a few indentations on the pads of the Caterpillar treads, just a few small ones, but not anything to amount to that would interfere with the operation of the machine. The excavator chain seemed to me to be in very good shape.

An operator can't go back and look at that thing going over the sprockets while it is in motion, but as far as I know, from the position where I was operating it, it operated satisfactorily. It didn't jump off the sprockets which it does when there are bad links and the chain being out of pitch with the edge sprocket. There might be one bent link in there and it will throw your chain off, naturally.

While I operated it, it didn't jump the sprocket, unless we hit a rock down there and then it would jump off.

We made several repairs on the machine during the time it was on this project. We put on new links all the time. There were new links put in that chain, I imagine, at the rate of 4 or [88] 5 a day, because we would break them, this rock would. There were 180 links in the excavator chain, I think. There are two of these chains and about 90 links in each chain. The machine was used practically every day and it was there a month before they started to have 2 shifts on it, the night shift.

During the work, we broke a hoist nut that hoists the boom and we had to wait for that to come, and we put the hoist nut in and the hoist screw in, and when I think—that was around 3 days—and then

(Deposition of Ward A. Brownfield.)

we had another breakdown. We broke the head sprocket shaft. That is the shaft that the sprockets are connected to. And then the rainy days took up the other days that we didn't work. In other words, a 10-day period was made up of days of inactivity intermittently. We made other repairs on this machine during the period from December, 1940 to April, 1941 other than as I have heretofore described. We put in a transmission shaft, but that was put in during the night shift so I didn't lose any time on that.

I stated previously that maybe at times we might have put in 4 or 5 or 6 links in the excavator chain a day. Hitting a big rock and things like that, would cause us to replace particular links. You are to understand that it was only when a link broke that we replaced it. To my knowledge 4 or 5 or 6 a day would break, and it would be necessary for us to replace them before we could continue operation. In other words, the breakage of one link would stop the operation of the machine.

As to the other repairs made during the period the machine was operating on this project, there were times when we would tear off on idler on the bottom of the boom and the chain would come up. It might have hit a big rock and the chain comes up and before you can notice it, unless you have some good man back there, he just lets you tear everything up. Well, at times we [89] would have to stop to replace those. I wouldn't remember how

(Deposition of Ward A. Brownfield.)

many idler rolls we replaced. We had them welded and I think we put an—I don't know as we put on any new ones. I think we just welded what we had.

I do not think of any other repairs on this machine while it was operated on the project. I was there when the project was completed and when this particular trenching machine was taken off the job.

After this trenching machine was no longer on the project, it was repaired before it was returned to Los Angeles. The valves were ground, what you would call a tune up, and the pan of the motor was taken off and the sludge from the oil cleaned out, and we put in a new liner in the twin disks, a master clutch, and we put in new bevel gears in the conveyor drive, we put new sprockets on the idlers for the conveyor chain and shafts, and we rebabbitted all the chains on the boom. Those are idler roller chains, and they welded flanges on the tail wheels. They are welded all the way around. And there was a new conveyor belt for it.

That is the conveyor that takes the dirt out. And we replaced a number of the chain links, around 20, I think it was, and we welded all the buckets. The lips on the bucket were broken out, some of them, where the teeth had been pulled off, and we had those all welded and put back on. This repair work took 2 weeks, and was done out right where we loaded the machine. We loaded the machine on a railroad car at the siding of Fort Huachuca.

I next saw it out at the Los Angeles freight depot

(Deposition of Ward A. Brownfield.)

where I helped to unload it. I took it over to the yard of Culjak and Zelko, the plaintiff's yard. We took it over by truck and trailer upon which we loaded it from the railroad car. [90]

When we returned the machine to the yard of the plaintiffs, Mr. Devine over there helped me unload it. As to whether the machine was in substantially as good a condition when it was placed by me in the plaintiff's yard as it was when I first saw the machine at the project at Fort Huachuca, well, the pads on the tracks were in terrible shape. When we took them off—I helped take them off—and when we got them off and when we took the hinges off of the pads, the wood just all fell apart; and the chain to my knowledge was approximately 75% good, but I didn't measure any links to come to that conclusion. The links may have been off pitch quite a bit, but seemingly, to look at it, I would say that 75% of the chain was in fair shape.

I did not notice anything wrong with the operation of the excavator chains on the day we finished the job at Fort Huachuca, because we had rock and it was pulling the machine down anyway so you couldn't tell exactly whether the pitch of the chains was pulling the motor down or whether it was a rock.

Mr. Cavanaugh told me to do the repair work on this machine before it was loaded on the railroad car and taken from Arizona to Los Angeles. My instructions in connection with this work were to put it in as just good repair at it was when it came

(Deposition of Ward A. Brownfield.)

down here. I followed out those instructions as near as I could. Those were precisely the instructions Mr. Cavanaugh gave me. At the conclusion of this repair work, I had a conversation with Mr. Cavanaugh. I asked him what he was going to do with the treads on the track, that they were pretty badly mashed up, but I don't remember his reply to that question.

At the time I was operating this machine, I was employed by Del E. Webb and White & Miller Construction Company. After I left the employ of the defendant, and about 2 weeks after I returned the trenching machine to the plaintiffs, I went to [91] work for the plaintiffs. I worked for them about 4 months, I think, all that summer; from about May until along in August, I believe, or September, off and on. When I first started to work for them, the job I was working on was the Van Nuys job, a sewer job. I don't remember how long that job lasted. It must have been a month or 6 weeks anyway. I worked on that job until its completion.

From the time that I commenced to work on the Van Nuys job, until the time that job was completed, this trenching machine to which we have referred, was used by the plaintiffs on this job; not every day, because it was a wet job. They might dig 50 feet and lay that. It might take them 3 or 4 days to lay that. But it was there at all times. I wasn't the operator at that time; but I saw it every day.

(Deposition of Ward A. Brownfield.)

Along in the latter part of August I saw those pads I referred to. I saw the wood fall to pieces. I was helping to take them off the machine. That was the first time that I had ever seen the inside of any of those pads. You can't see them because they are enclosed. The ends are open so you can see the ends of the wood.

I was never called upon on this Van Nuys job to do any repair work on this machine, and I couldn't say whether any repair work was done on it on this Van Nuys job.

After leaving the Van Nuys job, this machine went to Inglewood, I think in June or July. I also went to work down there, but did not operate the machine. I think it worked down there 3 or 4 days, maybe a week, but it was down there a little longer than that, I think, because they didn't take it right into the yard when they got through. From there it went into the yard where it stayed until it was repaired in August. From the time that I came back from the Inglewood job until this repair work on [92] the machine was done in August, I did other work for the plaintiffs. At the time I did this repair job over in Arizona at the conclusion of that job, the tractor pads were in much worse shape than when the machine was delivered. They were in much worse shape than ordinary wear and tear for that period of time would make them. There was one good reason why they were in the shape that they were in. It was rock. They were running over rock. I mean they were

(Deposition of Ward A. Brownfield.)

digging through rock. And another thing, they had to run this machine on its own power from points to where they were supposed to dig, and that was all open field and some of the time that was run at night time to these different locations. I did not run it at night time, but I know it was shifted around to different positions, digging points, and some of that was done at night.

When I finished this repair work at Fort Huachuca, except for the pads on the Caterpillar treads and except for the fact that the buckets were welded buckets instead of new buckets the machine was in as good a condition as when it had been delivered.

Cross Examination

By Mr. Barry:

I worked on this machine in the employ of plaintiffs about 3 days in November, 1940, before it went to Fort Huachuca for this work. At that time, it was in very good condition. When I worked on the machine those 3 days in November of 1940, the wood ends of those track pads were checked a little bit, and also there were a few depressions in the casing metal. When I say the wood was checked, I mean the wood was checked just like an ordinary board would be checked on the ends, little checks, little checks in them, small slits, as it were. As to these depressions or indentations on the surface of the [93] steel covering of these wooden portions of the tread pads, there were a

(Deposition of Ward A. Brownfield.)

few, but they weren't very deep. They were noticeable.

As an experienced operator of a machine of this kind, and being familiar with such machines, I don't think the checks in the wood or the indentations on the metal which I noticed in the machine in November 1940, or thereabouts, would have an effect on the working part of the pad at all, nor would they have any effect upon the machine if it were to cross a street.

I testified that before this machine went to Arizona the pads were in very good shape, because of my familiarity with machines of this character and because of having operated them for long periods of time, for 17 years. As to whether there was anything in the nature of the work that was done in Arizona by this machine while in operation by the defendants that affected the track pads of the machine, there was the formation of the ground. You couldn't use these trenching machines on solid rock. They are used on solid rock when the rock is blown out or blown up by dynamite.

However, every place that this sewer was put in down there the roadway for the machine was bladed. They run a road grader over it to level it down. And of course there were rocks that were sticking up that they couldn't get out, but they tried to put dirt on that so that we wouldn't run the tracks on it because if you deliberately run over rocks of course you are going to break something, but the road was made, it wasn't just a raw concrete, it

(Deposition of Ward A. Brownfield.)

was level to a certain degree, and to a certain extent, we succeeded in covering over those rocks that were sticking up, but to a certain extent, they were still there. The effect which these rocks that remained had upon the tractor pads was that the weight of the machine on these pads would bend these casings on these wood pads and break the wood inside the pads. [94]

The passing over of these track pads over these rocks, over such rocks as I have described, would cause indentations in the steel covering of those wooden portions, and such indentations would be different from the kind of indentations that were in the machine when I saw indentations in November of 1940, in that there would be more of them and deeper. The effect of them would be that it would throw the pitch of the links on the pads off from the sprockets that drives it, and that would break and bend shafts, and it would tend to put a strain on all of the working parts of the trenching machine. It would affect the machine in maintaining a straight or direct line and would cause it to run from one side to the other. It wouldn't run true. I testified that in going from one part of the works to another in Fort Huachuca, it was necessary to cross over fields or certain ground to get the machine from one location to the other. The open fields there were most all rock, and I believe the machine was run over such rocks as were on such fields. They couldn't help it once in a while,

(Deposition of Ward A. Brownfield.)

especially when they were moving at night. I didn't work at night at all.

In my opinion, the pads at the time the machine was repaired at the siding at Fort Huachuca prior to being loaded on the railroad flatcar, were in very bad shape. That opinion is based upon an examination which I made of the machine at that time.

To my knowledge, before we made the repairs, while the work was still uncompleted, the machine was all right. There are times when a bent link will throw the chain off the sprocket. After it comes off we have to put one on to replace the bent one that throws the chain off.

Ordinarily, we could tell why a link would jump the sprocket. It would be either a bent link or a rock in the top of [95] the head sprocket that drives the bucket line. If a link is stretched, its length is longer than the pulling space on the head sprocket. The head sprocket is a 6 point stationary casting with teeth on it, and if the links stretch out, they won't go over the head sprocket, they won't mesh with the teeth on the head sprocket. The 2 chains have to go over this sprocket at the same time at one point, and if one side of this chain is pulled, one link is stretched, that throws the pitch off the other side too. In other words, if there is one defective link, it has a tendency to interfere with the effectiveness of the other links also, and if you neglect to repair a link promptly when the repair is needed, the result might be that the entire chain of links would be detrimentally affected.

(Deposition of Ward A. Brownfield.)

After the digging was completed on April 3rd, we spent a period of around, I think, 2 weeks making repairs there. Those damages requiring those repairs did not occur during the last few minutes of operation.

We put in a number of links after that. Those links were in good working condition. The links we replaced were not, to a certain extent, in good working condition, and that is the reason why we changed them, but we didn't change them while the work was being done; we waited until it was finished. The last day we could have bent a lot of links, because there was a lot of rock out there, a lot of rock all through the job, as a matter of fact. Some of it was conglomerate all through the job. There was solid rock and we had to raise the boom and blast it out so we could go on. The ditch had been dynamited before ahead of us all the time. And then we used this machine to excavate that dynamited rock. As to whether trenching machines of this character are used for that purpose, this one was down at Fort Huachuca. [96]

Trenching machines are not used for excavating solid rock that has been blasted out. It is not practical. Using a machine of this kind upon rock such as I described would have a straining effect on all the links of the chains, the head sprocket and head sprocket shaft. It would have an effect on the pitch of these links.

Pretty nearly all the difficulties that we had over there with these chain links were due to rocks.

(Deposition of Ward A. Brownfield.)

It is my opinion that, outside of the pads on the track and the buckets being welded, instead of being as they were before, the machine was in about the same condition when returned to plaintiffs as when it arrived at Fort Huachuca. When the machine arrived, the buckets had teeth along the lips. These teeth were broken off and sometimes a part of the lip would be pulled off and that is where the buckets were welded. As far as working, I think they will dig just as well.

In my opinion, 25 per cent of the links in the excavator chain were in bad shape. When 75 per cent of the links in an excavator chain are in good shape and 25 per cent in bad shape, the pitch of the links is off and the 25 per cent had links have a tendency to put the other 75 per cent in bad shape. When I assisted in making the repairs on the machine the last of August or first of September, we put new treads on the track, those are called multi-pedal slats and bolts. I don't remember how many we put in. We replaced all the links in the excavator chain.

Redirect Examination

By Mr. Jewell:

I have stated that a roadway was built on which to operate this tractor on the Arizona project and an effort was made to avoid rock. That is customary. This roadway was built as free from rocks as they could do it. They had one man out [97] leveling up in front of the machine. All he did

(Deposition of Ward A. Brownfield.)

was to level the ground and take as many of the rocks off the roadway as he could. I never saw the machine moved at night and wouldn't know whether it was moved without a man moving rocks in front of it or not and wouldn't know whether, when moved at night, it went over any rocks or not.

While I was operating the machine I had no trouble with it going straight. At times it would get off, but usually it stayed pretty well on the center. As long as they can get the pipe in they don't kick about being off center a little bit, three or four inches doesn't make any difference.

It is customary to keep an eye on your excavator chains. The chain does not rotate by you. The operator does not get out to watch the excavator chains and see what condition they are in. He will not get off the machine or let anybody else on it. It is customary to know at all times what condition your machine is in. You go around it several times a day and it is not merely inspection, but your eyes are trained to look at all the things that can get out of order on the machine. I might say I watched the machine constantly. I can tell by the feel of the operation of the machine if something is wrong. However, you can tell a bent link only if it comes off the sprocket. It is not customary to measure those links to ascertain if they are stretched.

I said 25 per cent of the links were bad after we placed 20 new links on the chain at the conclusion of the operation. Some of those links were just

(Deposition of Ward A. Brownfield.)

bowed, just bent a little bit on one side, that is the 25 per cent.

As far as I know 100 per cent of the links were perfectly straight when the machine was delivered to the project. The 25 per cent of links that were bowed or bent would put undue strain and wear on the head sprocket teeth and also the [98] sprocket shaft and would cause the remaining 75 per cent to become damaged, because if there is one link that wasn't stretched on one side and the opposite link, on the side directly opposite this link, would be stretched, it would pull the whole chain and, of course, when it comes over, there is only one sprocket on the top and at the bottom and the stress would be on the head sprocket.

A trained operator couldn't detect with the naked eye particular links which were bent to some degree unless he watched them go over the sprocket, or put a square on the link, or a rule or calipers. But at times you can see if a link is stretched enough and you can see them if they are bent.

The 25 per cent which I testified were bad were either bent or stretched and those in that condition would be readily noticeable to a trained operator.

I told Mr. Cavanaugh that the plaintiffs would probably not accept the buckets.

Q. Would you say, in view of your experience as an operator of this type of equipment, that with respect to all the type of terrain where you operated this machine, or where you knew this machine was operated in Fort Huachuca, that its operation on

(Deposition of Ward A. Brownfield.)

such a type of terrain was customary and usual for a trenching machine of this type?

A. No it is not usual.

It is not practical for the reason that it costs too much money to do it that way. The dynamiting and repairs cost too much.

Recross Examination

By Mr. Barry:

The reason there was so much repairs while this machine was on the job was because of the character of the terrain. First the solid rock which was encountered was blasted and then the [99] machine was used to excavate it. Sometimes boulders, about 3 by 5 feet and equally thick, would be encountered in conglomerate formation and these had to be dynamited. They were imbedded so solid we couldn't get them out. I don't think they were quite 3 cubic feet in dimension, but they were about 2 cubic feet. These we could take out and carry on the conveyor. This job was an unusual job for a trenching machine. In all my experience of 17 years in operating these machines, I had never seen a machine of this character before operated on such ground.

When I stated on direct examination about the taking out of those rocks after they had graded the road in front of the machine and I stated they took out as many of the rocks as they could, that indicates that there were some they couldn't take out, but this man we had in front would cover those up, so that

(Deposition of Ward A. Brownfield.)

we wouldn't ruin the machine by going over those rocks; but, nevertheless, there were some of those rocks that remained after that kind of operation and to a certain extent they were injurious to the machine.

Redirect Examination

By Mr. Jewell:

It is not customary to use a machine of this type in cases where it is necessary to blast conglomerate rock.

TESTIMONY OF LESLIE H. SNELLING

a witness for defendants.

Direct Examination

By Mr. Jewell:

My name is L. H. Snelling. I reside at 919½ Eighth Street, San Fernando, California.

I am acquainted with the contracting firm of Culjak and Zelko and have inspected a number of jobs they have had for the City of Los Angeles.

On April 28, 1941, I was inspecting for the City of [100] Los Angeles the job known at the Longridge Sewer Job which was being constructed from Riverside Drive to Moorpark Street in the North Hollywood district of Los Angeles. That job was being built under contract with Culjak and Zelko and the city of Los Angeles. Culjak and Zelko were digging the sewer trench; the job had started prior to the 28th of April and they had been using a

(Testimony of Leslie H. Snelling.)

small trenching machine to dig the trench. The ground was wet and it was necessary to pull a shield behind the trenching machine. The small machine they were using was not capable of doing the work very well. Mr. Culjak told me a few days prior to the 28th of April that he had a bigger machine which had been rented out on a government job in Arizona and which would be returned to him in a few days, and said that as soon as he got it back he would put it on this job. A few days after he told me this, and on the 28th day of April, 1941, he did put the big machine on the job. He told me he had just gotten it back from Arizona. The big machine was a chain-bucket type Austin trenching machine. On April 28, 1941, the big machine was placed on the Longridge Sewer Job and worked continuously on that job until the 7th of May, 1941. It was then pulled out of the trench and moved over to the job on Magnolia Boulevard.

On May 13th the machine was put to work on the Magnolia Boulevard job, doing the same kind of trenching work that was done on the other job, but without the shield attached for a few days and then the shield was again attached. The Magnolia Boulevard job was completed on June 11, 1941. The machine was then moved back to the Longridge Avenue job on June 30, 1941, and again put to work on that job and kept there until it was finished on July 22, 1941. Part of the time, on both of these jobs, a shield was carried by the machine, due to the wet condition of the dirt. [101]

(Testimony of Leslie H. Snelling.)

I was the inspector on both jobs and saw the machine in operation every day while it was being used. There was an interval from the 11th of June to the 30th of June during which the machine was not being used on the jobs I was inspecting. I do not know what happened to it in that period of time, but so far as I could see and observe no major repair had been made on it.

Insofar as I could tell from watching the machine operate, it seemed to be in reasonably good condition from the time it was brought back from Arizona and put on the job, until it was taken off. I did not hear Mr. Culjak or Mr. Pat Devine, who worked for him, make any complaint about the work the machine was doing, or say or indicate in any way that the machine was not capable of doing the job.

So far as I could tell from watching the machine operate, it seemed to be in a reasonably good state of repair and in a condition where it would do the work it was supposed to do. I did not see anything that would indicate that the machine had been misused in Arizona. In any event, it was in good enough condition that it did the work when brought over here, without any major difficulty and no breakdowns of any consequence.

During the time that Culjak and Zelko were doing the work above mentioned they had in their employ, at least for part of the time, a man named Brownfield. I am not sure that he operated the machine, but I know that he was around the machine and

(Testimony of Leslie H. Snelling.)

working on the job during most of the time that the contract was being fulfilled.

Cross-Examination

By Mr. Barry:

When making inspections, as a city inspection, I am interested not only in the finished work but in the work as it progresses, such as the width of the trench, and the backfilling. [102] I mean I am interested in the character of the work done and not the machine that does it. I am only interested in the finished product, and it make no difference to me whether they dig it with a pick and shovel or a trenching machine if the work is done according to city specifications. We are not interested in whether a machine works efficiently or not so long as the trench is on a true line.

I cannot make the statement as an actual fact that I was able to tell whether the machine was efficiently operating or not. I could only tell from sound and from watching. It did not make any grinding noise that I know of. I was right behind it. The most noise is by the motor.

I am not a mechanical engineer. All I know about these machines is to see them working. I couldn't tell its parts nor distinguished whether this was one machine or another machine. I know the different types, such as Barber-Greens and Austins and Pearsons. I would know this machine was an Austin because of the make.

The reason I stated in my direct statement that

(Testimony of Leslie H. Snelling.)

the machine seemed to be in reasonably good condition when brought back from Arizona is because there were no breakdowns.

That was soft ground,—no rocks or hard substances to excavate, yet there are breakdowns in that type of ground, not only on Austins, but all types of trenching machines; just like a man with a pick, if he don't have it sharpened once in a while, he is slowed down.

They put a shield on the back of the machine to keep the mud from filling in the trench.

I called their attention during the work several times to the fact that they were deviating from the line of the sewer and we had to get back on the line. [103]

It was not customary for Mr. Culjak or Pat Devine to complain to me when their machine was out of order. I never heard them at any time make a complaint about a machine not working properly. When the inspection department such as I represent has to talk to a contractor about faulty work, he lays it on to the machine, but if Pat Devine and Culjak had any complaint about the machine they kept it to themselves.

As far as my statement on direct examination that "so far as I could tell from watching the machine operate, it seemed to be in a reasonably good state of repair and in a condition where it would do the work it was supposed to do. I did not see anything that would indicate that the machine had been misused in Arizona," I didn't inspect it. I made

(Testimony of Leslie H. Snelling.)

that statement as they asked me. As a matter of fact, there could be a lot wrong with that machine and I would never know about it, even if I inspected it.

Redirect Examination

By Mr. Jewell:

I never looked at the track pads on the machine. I didn't look at them close enough to notice any indentations or anything like that.

As to the deviation that occurred in digging this ditch, the reason for such deviation in my mind was that the pressure of the wet dirt—almost quicksand—and the weight from one side might, before they could get it tight again, push it over and this whole shield and all might be moved over one way or the other, or it might be a case where the tracks on the digger was not even, but so far as I know the deviation in the trench wasn't any greater than some other trenches that are made.

TESTIMONY OF DAN CAVANAUGH

a witness for defendants.

Direct Examination [104]

By Mr. Dougherty:

I am general manager of L. N. White Contracting Company. Between the first of December, 1940, and the latter part of August, 1941, I was superintendent of Del E. Webb and White and Miller, at

(Testimony of Dan Cavanaugh.)

Fort Huachuca. I know that trenching machine that was used on the job building the cantonment there. I saw it when it first came on the job. It was in very good condition. It was on the job from the middle of December to about the middle of April. It was used digging trenches for the sewer and water lines. The land there is composed of real fine silt, clay that is embedded by boulders—the boulders are embedded in this fine dirt.

They always run the blade along the ditch line that was staked out by the engineers. One man worked in front of the machine, clearing out where the tracks run. There were rocks embedded and some projected through the surface. When there were large rocks showing above the surface this man was supposed to throw dirt over them, so the machine could pass over them.

Prior to digging this ditch, it was all shot along the line of the ditch. When they would strike a big boulder down in the ditch line they would shoot it again down below the surface.

There were many repairs on the machine while it was there.

Mr. Dougherty: This list here, your Honor, is in evidence by stipulation.

The Court: Repair list.

Mr. Dougherty: A prepared list submitted. It is conceded it is part of [105] the evidence in this case.

The Witness (Continuing): I could not tell the exact number of those chain links furnished without

(Testimony of Dan Cavanaugh.)

seeing the list. I know we were buying parts all the time and tried to keep a supply on hand. The machine was kept operating all the time it was there, and there were some repairs made almost daily. The pads looked good when they came, except they showed they were weather-worn.

I have been twenty years in the contracting business. I have had experience with trenching machines, including the Austin trenching machine. This pad you call my attention to is a multipedal pad. This condition here shows that it is deteriorated wood. It is not just wet cracked. That is from age. Those cracks indicate dryness.

I am familiar with these chain links. It was the practice to change the links whenever they got cracked or bent. I would call that a necessary field repair. I would also call it a necessary minor repair.

We did not replace or repair any of the multiple pads on the machine because the machine did the work satisfactorily while it was there. We considered the replacing of those pads on a machine a major repair.

Q. And what is meant by the phrase "necessary minor or field repair"?

(Objection by Mr. Jones as calling for a conclusion. Discussion and argument by counsel.)

The Court: Go ahead with the examination, with the understanding that the Court reserves the right to eliminate all this testimony if counsel can show it is immaterial.

(Testimony of Dan Cavanaugh.)

Mr. Dougherty: [106] Read the question again please.

The Reporter (Reading): "Q. And what is meant in the trade by the phrase 'necessary minor or field repair?'"

A. Minor repairs, as I understand it, are repairs to keep the machine running.

Mr. Jones: If the Court please, the phrase "minor repairs, as I understand"—That does not mean that the expression has a meaning in the trade, and I move to strike that answer.

The Court: It may go out. The motion is granted.

Mr. Dougherty: As generally used in the trade, what does that expression mean?

A. It means to keep the machinery, the equipment running; the repairs necessary or required to keep the equipment running on the job. Major repairs are considered such as overhaul repair, or some heavy shaft, tracks, or something like that, or it has to go into a shop or someplace outside of the field shop. I think the term field repairs would be the same as minor repairs. It would mean the repairs or work necessary to be done on the machine in the field to keep it running.

It was not necessary to put on new pads, repair the pads, to keep the machine running on our job. I regard the making of repairs on the chain links as necessary minor repairs or field repairs.

When the job was finished, I told Brownfield, the man who was running the machine, that we wanted the machine put back in the same condition

(Testimony of Dan Cavanaugh.)

it was when it came, ordinary wear and tear excepted. He worked on the machine. He had helpers, I don't know [107] how many. He worked on the repair job about two weeks. The machine was not used again by us after the repairs.

We blasted all the trenches and then if we came to boulders we blasted again. This is spoken of as rock. It is not rock. It is boulders embedded in this fine, silty ground that becomes very hard and tight, but when broken up is a very fine dirt. These big boulders are only occasional. Most of the boulders or rocks are small, up to about six or eight inches in diameter. Occasionally, they run into a reef of big boulders and that is where this testimony has come out on these big boulders, but in the majority of cases after the ground was shot, the dirt dug very well. That is the common use of those machines there.

The machine was never moved very far from one line to another. Only on two occasions was it moved more than a few hundred feet. One time the machine was walked perhaps a mile, not at night. And then, when the job was finished on the west-end, the machine was walked back again. Those were the two long walks. Like any other utility-ditch, the ditches are close together; especially they were on that camp job.

Cross Examination

By Mr. Jones:

Q. Now, Mr. Cavanaugh, is it not a fact that you considered those two terms in the contract as

(Testimony of Dan Cavanaugh.)

requiring you people to do the minor or field repairs and put you under the obligation to put the machine back into the condition it was when you got it, ordinary wear and tear excepted?

A. Yes, sir. That is what I considered those terms to mean in effect. I thought we had the obligation so far as the chain links were concerned. I remember they were spoken of by Mr. Brownfield who told he they were in bad shape. I knew they were in bad shape, [108] much worse than when we got them; but I am sure if those wooden pads would have been good, solid wood, we would not have the condition we have now.

I don't know who had Mr. Collins look at the machine for us, but he was authorized. Collins was a well known man in the trade to pass on things of that sort. Mr. Morrison was a White and Miller representative.

I have never operated or repaired a trenching machine.

I said the machine had two long walks from the two ends of the ditch. From the sewage disposal ground was about a mile and from the old fort about two miles. It made those trips overland. I have never used board under trenching machines unless to level it. You have to throw plenty of dirt to protect the machine against projecting pointed rocks. Whether they did that or not I don't know.

(Testimony of Dan Cavanaugh.)

Redirect Examination

By Mr. Dougherty:

I would not say, due to the terrain, that the damage done to those pads could be considered ordinary wear and tear.

Q. Would it be ordinary wear and tear for that terrain?

A. Yes, sir, it would be for that terrain.

Mr. Dougherty: That is all.

Mr. Jones: Q. It would not ordinarily be considered ordinary wear and tear?

A. I say due to the terrain. That was more than ordinary wear and tear.

Mr. Dougherty: Defendants rest.

Rebuttal

TESTIMONY OF MARTIN CULJAK

(a witness for plaintiffs) [109]

Direct Examination

By Mr. Jones:

As to the meaning of the words "necessary minor repairs," we consider in the contracting business that anything that is damaged on a construction work should be replaced at the time it is damaged, and not wait until everything is gone; and as to "field" repair that anything damaged in the field should be repaired right there and not wait until everything is gone. If a pad is damaged and bent

(Testimony of Martin Culjak.)

and indented and spread out, the operator should stop right then and put in a new slat right there and not wait until all of them are damaged. **Anything** beyond actual wear and tear that is damaged is not ordinary.

The machine was actually operated about eighty hours altogether after we got it back from Arizona and before it was repaired. It ran at different times a few hours a day, but altogether it was about eighty hours.

When Mr. Collins inspected that machine at the request of the defendants, it had been operated about six hours. That was on the North Hollywood job. He could not see all the links of the chain because the boom was in the ditch and the lower part of the links was covered in the dirt. It was not in operation when he saw it, the day being Sunday. Forty-five of the links he could not see. He was not right when he said there were one hundred and fifty links in the chain, because we put in one hundred and eighty.

By putting all the weight of the machine on one place on that traction pad, it crushes the wood entirely, regardless of the kind of wood, even if brand new. It would crush even a steel block if you put all the weight on one point, forty tons. You are bound to bust something.

Cross Examination [110]

By Mr. Dougherty:

When you put a forty-ton weight on top of a small projection, most naturally something would

(Testimony of Martin Culjak.)

have to crush or bend or something would have to give. It is not built to travel over such terrain as that.

The two jobs upon which this machine was used about eighty hours were about three miles apart. Our warehouse is approximately sixteen to nineteen miles from the jobs.

I knew when I rented the machine that it was going to be used at Fort Huachuca. We do not say in the contract the kind of ground our equipment is to be used on, but we say our equipment is to come back just as it went. The contract says that the lessees should make all necessary minor or field repairs, but there is no such thing in the contract that we should make the major repairs. We are not to make any repairs on the project.

Redirect Examination

By Mr. Jones:

I asked Mr. Morrison what kind of ground it was and he said it was some hard clay but no rock in it. I said, "Mr. Morrison, if you have any rock in the ground, I am not interested in renting the machine, because I need the machine in my business and cannot afford to wreck my machine," and he said there was no rock in the ground. I took his word for it. I never was in Fort Huachuca and did not know the condition of it.

The machine was moved to those jobs at Van Nuys and other places and from job to job, after it came back from Fort Huachuca, with a truck and

(Testimony of Martin Culjak.)

trailer. We are not allowed to run it from job to job on the streets. It is a misdemeanor to run it on the streets except with truck and trailer. The work done by the machine at Inglewood was done after it was repaired by us.

TESTIMONY OF PAT DEVINE

(a witness for plaintiffs) [111]

Direct Examination

By Mr. Jones:

The wood in those pads is oak or hickory. This wood is first kiln-dried to take the shrinkage out of it. They then put it in a press and drive it through a frame press, small at one end and bigger at one end, and they press it through that. That's to take up any slack in it. The undertake to thoroughly dry the wood. They next put it in a big vat of linseed oil, to save it from expansion, contraction or rot and also to waterproof it. This is done to protect it from rotting or expansion. If it is waterproofed, it will not take up water and will not expand.

That wood is thoroughly dried before it is put in the pad. It will last for years. You could bury it in the ground and it would last for years,—fifty years—because it cannot take up any moisture.

(Witness examines pads Mr. Cavanaugh was looking at.)

(Testimony of Pat Devine.)

This pad is crushed. Its deterioration is not due to dryness because it is out of shape. It is apparent on its face that it is crushed. When that pad received blows sufficient to make those heavy dents or indentations in the steel, it crushes the wood. I cannot see any dry rot in the wood. You see the oil is right through that (Takes small piece from the wood and exhibits it. Witness demonstrates difficulty in breaking wood).

Q. Take the other end there and let the judge see you get a piece off of there.

A. I can't hardly cut it. It is solid. If there was dry rot, you could not see the grain of the wood.

If there was a newly bought pad, with brand new wood in it and had received the same treatment this particular pad did, the same thing would happen. It would squash a new plug the same [112] as that. The track is nine and one-half pounds to the square inch, and if you don't distribute the weight—you can multiply that a thousand times, and put all that weight on the surface, and something is bound to squash. A small surface cannot bear the weight or forty tons.

One of the methods of protecting the pads in operating over rocky ground is to plank it, and the other is to drag off the rocks or take them out or cover them over. The pads cannot be protected by shoveling just a little dirt over the rocks. It requires not less than six inches of dirt over the rock, and then you have to give it a gradual pull when you are going over a rock. When we are

(Testimony of Pat Devine.)

moving the machine and we come to a rock likely to cause damage to the pads, if it is too big to take out, we cover over with either plank or dirt, and in some cases we break the rocks up in pieces and throw them out. As to the amount of dirt used to cover them over, it depends upon the size of the rock. Some would take a wheel barrow and another a yard of dirt. We would put the dirt at least six inches above the top of the rock. That is the common practice because if there is not enough on there the weight will squash the dirt.

If that had been done, I don't think these pads would be in this condition.

A blade would remove all the loose rocks, but would ride over those embedded in the soil. You would have to cover those with dirt or break them up with a sledge or put boards over them.

When we got the machine back to California, the tracks were warped out of shape and spread, and had lost their pitch. They would buckle up into a V-shape, and then with the carrier roller coming along, it would have to go over this and that would throw all the weight on one side and drag you off the line. [113]

There was no purpose in making complaint about the machine to Mr. Snelling. He is only an inspector.

Minor repairs and field repairs are practically the same thing. A minor repair could be a bolt came loose. The key could get loose and the gear would shift a couple of inches. You have to stop

(Testimony of Pat Devine.)

fix such things. A field repair would be anything that should be replaced. If a major part of the machine, like a shaft, was broken in the operation, that would be a field repair. I would say a field repair is any breakage or condition resulting from operation.

I Would say those injured or damaged pads were field repairs.

This machine was moved from job to job in California by truck and trailer.

The practise in operating these machines in ground where there are rocks is to always have a man on each side of the trench. They watch for rocks and when they come up they ring the bell and the operator shuts the machine down. Two men are necessary because one cannot see both sides of the trench.

When Mr. Collins inspected this machine it was on Magnolia Street. The boom was down in a nine foot trench. The buckets and chain were full of and buried in dirt. He could not see the entire chain. You can't crawl down there. There is no room for you.

There were one hundred and eighty links in the chain. The maximum depth the boom will operate is twenty-five feet. The machine was set for fifteen feet for Fort Huachuca. When you want to excavate twenty-five feet you have to have more chain than you have to have for a fifteen foot boom.

(Testimony of Pat Devine.)

Cross Examination

By Mr. Dougherty: [114]

I have never been over the ground at Fort Huachuca. Brownfield told me they had two men to keep the rocks off, one on each side.

Q. Look at this. Is that wood crushed?

A. That is where the rock was caught in between the two.

Q. There is no crushing there, is there? It is wood here.

A. It is wider in here and wider in here.

Q. There is no crushing here, where you see these indentations?

A. The whole block is crushed. It was squashed out in here. This should be tight in here, but it would squash it in here, and squash it out at both ends.

Q. By putting that bolt in is when they crushed that, wasn't it?

A. No, that could not happen. It is the same as putting something in a vise. It is solid here and here (indicating). It is more crushed where the bolt goes through because a rock came here and a rock in here.

The changing of links is a minor repair. It takes about twenty minutes to change a link when you break one. A minor repair would cause a field repair if neglected. A minor repair and a field repair could be the same. They both cover the same thing exactly. The breaking of a differential answers the same question. The only thing is that

(Testimony of Pat Devine.)

you are laid up longer. You have to go to a machine shop and get it repaired or get a new one. It could be a field repair.

A general overhaul would not be a field repair, babbit up all the bearings, scraping, painting, cleaning.

When you break a pad, you take it out and put in a new one, because that one defective pad will break up a series of pads, because it does not function properly.

Lots of things you can get by with. You can get by without a tire in your automobile. You can run without it, and if [115] you have to, you will do it.

Redirect Examination

By Mr. Jones:

A minor repair is a minor repair, just what it says. A field repair is any repair made in the field. It might be big or it might be small. Sometimes you have to take the whole machine apart. If it were a shaft that was broken, it would take several days to take the shaft out and put it back in. There are some repairs that are field repairs which are not minor repairs.

Q. What you really mean by minor repairs are field repairs, but there are some repairs that are field repairs that are not minor repairs. Is that what you mean? A. Yes.

Mr. Jones: That is all we have, if the Court please.

Mr. Dougherty: That is all, your Honor.

Respectfully submitted,

FRANK J. BARRY

CONNER & JONES

Attys. for Appellants. [116]

[Title of District Court and Cause.]

ORDER TO SEND UP ORIGINAL PAPER

It appearing that Exhibit 1 should be inspected by the appellate court and that a correct copy thereof is infeasible, it is

Ordered, that the Clerk send up said original Exhibit 1 and that it be retained by the Clerk of the United States Court of Appeals for the Ninth Circuit until the appeal be determined, and that it then be returned to the Clerk of this Court.

Done in open Court this 26th day of February, 1944.

ALBERT M. SAMES,

Judge.

[Endorsed]: Filed February 26, 1944. [121]

In the United States District Court
For the District of Arizona

May 1943 Term

At Tucson

Minute Entry of Monday, August 30, 1943 (Tucson Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

Civ-99

It Is Ordered that judgment for the defendant be entered herein. [122]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action came on for trial before this Court, jury having been waived, on the 17th, 18th and 19th days of June, 1943, Frank J. Barry, Esq. and Gerald Jones, Esq. appearing for plaintiffs, and John P. Dougherty, Esq. for the defendants; and after hearing the evidence, the arguments of counsel and being advised in the premises, I hereby make and file the following findings of fact and conclusions of law, constituting my decision in said action:

FINDINGS OF FACT

1. That the plaintiffs and defendants are residents and citizens of the States of California and Arizona, respectively, and that the amount involved in this action exceeds the sum of \$3,000.00.

2. That the plaintiffs and defendants on or about the 1st day of December, 1940 entered into a contract in writing, as set forth in the Complaint, whereby plaintiffs rented to the defendants a certain Austin trenching machine for the use by the defendants at Fort Huachuca, Arizona. [123]

3. That said machine was purchased by said plaintiffs and Pat Devine in 1930, and was operated about 10 or 11 months between 1930 and 1940, and for the last seven years of that time had stood idle in plaintiffs' yards at Los Angeles, and no repairs were made on the machine during those ten years. That when said machine was delivered to defendants it was in condition to render efficient, economic and continuous service.

4. That under the terms of said contract it was provided, among other things, that "All necessary minor or field repairs to equipment shall be made by the Lessee without cost to the Lessor. Other than minor or field repairs shall be made by the Lessors without cost to the Lessee".

5. That the said machine was, during December, 1940, transported by the defendants at their expense from Los Angeles, California to Fort Huachuca, Arizona.

6. That said machine was operated at Fort Huachuca by defendants from its arrival there until on or about the 7th day of April, 1941.

7. That during the time of said machine was at Fort Huachuca the defendants furnished and paid the operators thereof and in addition expended the sum of \$4,211.13 for parts and labor in making all

the necessary or minor field repairs to keep the machine in running condition, and also paid the sum of \$8,250.00 in rentals.

8. That at the termination of said operations the necessary minor or field repairs were made on the machine and it was then returned to the plaintiffs at Los Angeles at defendants expense, and shortly thereafter, on April 28, 1941, it was placed in operation by plaintiffs on the Longridge sewer job at Van Nuys, California, where it was [124] operated until May 7, 1941, when it was moved over to the Magnolia Blvd. job and operated there until May 13, 1941, and was then moved back to the Longridge job and kept in operation there until the completion of said job on July 21, 1941 when it was returned to plaintiffs' yards in Los Angeles.

9. That the plaintiffs made no repairs on said machine until the period from August 28 to September 16, 1941, when they made major repairs on it at their yards in Los Angeles, California.

CONCLUSIONS OF LAW

As a conclusion of law from the foregoing facts the Court hereby decides:

1. That the defendants, in accordance with the terms of the contract, made all the necessary minor or field repairs before delivering said machine to plaintiffs.

2. That the plaintiffs are not entitled to the damages prayed for in their complaint or at all.

3. That the defendants are entitled to a judg-

ment for their costs to be taxed herein against the plaintiffs and judgment is hereby ordered to be entered accordingly.

Dated: October 7th, 1943.

ALBERT M. SAMES,

Judge. [125]

(Second Draft) Proposed Findings of Fact & Conclusions of Law filed October 6, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona, By Hugh M. Caldwell, Deputy Clerk.

Findings & Conclusions filed October 7, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona, By Hugh M. Caldwell, Deputy Clerk.

Copy received this 6th day of October, 1943.

CONNER & JONES,

By GERALD JONES,

Attorneys for Plaintiffs. [126]

In the United States District Court
For the District of Arizona

May 1943 Term

At Tucson

Minute Entry of
Saturday, October 7, 1943
(Tucson Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

Civ.-99

John P. Dougherty, Esquire, Assistant United States Attorney is present on behalf of the defendant. No other appearance.

The defendants' proposed findings of fact and conclusions of law and plaintiffs' objections and proposed amendments and additions thereto having been submitted to the Court,

It Is Ordered that the plaintiffs' objections to proposed findings be denied, except that there be added to paragraph three of defendants' proposed findings the following: "That when said machine was delivered to defendant it was in condition to render efficient, economic, and continuous service"; and that the word "continuous" be stricken from the last line of paragraph 8 on page 2 of defendants' proposed findings.

It Is Further Ordered that the plaintiffs' proposed amendment and additions to defendants' proposed findings of fact and conclusions of law be denied.

Said counsel for the defendant now presents re-engrossed form of findings, and

It Is Ordered that same be approved and filed.

Said counsel for the defendant now presents form of judgment and represents that the same has been approved as to form by counsel for the plaintiffs.

It Is Ordered that the same be approved, entered and spread on the minutes as Judgment herein, as follows: [127]

In the District Court of the United States
For the District of Arizona

No. Civil-99-Tucson

MARTIN CULJAK and JOSEPH ZELKO, co-partners in business under the firm name and style of CULJAK & ZELKO,

Plaintiffs,

vs.

DEL E. WEBB, doing business under the name and style of DEL E. WEBB CONSTRUCTION CO., and WHITE & MILLER, CONTRACTORS, INC., a corporation,

Defendants.

JUDGMENT

This cause came on regularly for trial on the 17th, 18th and 19th days of June, 1943, Frank J. Barry, Esq. and Gerald Jones, Esq. appearing as counsel for the plaintiffs, and John P. Dougherty,

Esq., for the defendants. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the Court sitting without a jury, whereupon witnesses were examined on the part of plaintiffs and defendants, and the evidence being closed, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon, the Court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is Ordered and Adjudged that the plaintiffs take nothing by their said action and that the defendants recover the sum of Thirteen and no/100 Dollars as defendants costs and disbursements incurred in this action.

Judgment rendered day of, 1943.
[128]

Proposed form of judgment filed October 6, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona, By Hugh M. Caldwell, Deputy Clerk.

Judgment entered and filed October 7, 1943. Edward W. Scruggs, Clerk United States District Court for the District of Arizona, By Hugh M. Caldwell, Deputy Clerk.

Approved as to form: Attorneys for Plaintiffs.
10-6-43, Rec'd Copy.

CONNER & JONES,
By GERALD JONES. [129]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL, TO STRIKE AND
AMEND FINDINGS OF FACT, CONCLU-
SIONS OF LAW, AND FOR JUDGMENT
FOR PLAINTIFFS

Come now the plaintiffs pursuant to Rule 59 of the Rules of Civil Procedure, and move the court to grant a new trial of this action, to strike and amend findings of fact of the court, conclusions of law, and for a judgment for the plaintiffs on the following grounds:

1. The undisputed evidence in this case is that the trenching machine when returned by the defendants to the plaintiffs was not in a condition to render efficient, economic, or continuous service because of the failure on the part of the defendants to make the minor and field repairs, set up in the pleadings and shown by the pleadings, thereto becoming necessary during the operation and possession of said machine by the defendants, and that the amount of damages and value of loss are in the sum of \$4166.80. These plaintiffs therefore move the court to set aside the judgment heretofore entered herein and rendered judgment for these plaintiffs and against the defendants in the said sum.

2. Finding No. 7 is immaterial to the issues in this cause. The amounts expended by the defendants for parts, labor, and/or [130] rent, have no bearing on the case, and plaintiffs move the court to strike said finding.

3. Finding No. 8 should be amended to conform to the undisputed evidence in the case as follows:

(a) So that it will state the extent of the operation of said machine; and

(b) So that it will state that when the said machine was returned to the plaintiffs it was not in a condition to render efficient, economic, or continuous service because of necessary minor and field repairs then needed.

4. Finding No. 9 should be amended to conform to the undisputed evidence in the case so that it will state that adjustments were made by the plaintiffs in parts of the machine to secure limited operation thereof by the plaintiffs upon its return to them.

5. The court erred in overruling plaintiffs' objections to defendants' proposed findings and in denying plaintiffs' proposed amendments to defendants' proposed findings.

6. Conclusions of law are erroneous in that they are unsupported by the findings of the court and evidence in this case.

Points and Authorities

The judgment of this court appears to be based on the view that if the machine, when returned by the defendants to the plaintiffs in California, was in a condition to be operated at all, the plaintiffs are without remedy. It is submitted that this is a mistaken view of the law. The plain intent of the contract was that the defendants should make all minor or field repairs required while the machine was in their possession and which were necessary

to put the machine in a condition [131] where, to quote the contract, it would render efficient, economic, and continuous service upon its return to the plaintiffs. This is equivalent to the common law rule that one who rents a machine of this type must return it in as good condition as it was when received, ordinary wear and tear excepted. While it is true that plaintiffs were able to operate the machine to some extent after it was returned to them, that operation was, nevertheless, neither efficient, economic nor continuous. The court will recall that adjustments had to be made at once in order to operate the machine; that the pads were in such battered condition that the machine could not be moved on paved streets without serious damage thereto; that in digging a trench, even in very soft ground, the machine would not run a true line and had to be constantly shifted, etc. 8 C.J.S. Sec. 27 p. 228—25 C.J.S. 600, 601, 631.

Since the amount of the damages was not in any serious dispute, it is respectfully submitted on the undisputed evidence in this case, plaintiffs are entitled to judgment in a sum not less than \$4166.80. True, the plaintiffs did not ask for that much, but that is a defect in the prayer only, and one which the courts these days ignore as inconsequential (Rule 54 C). The pleadings are amendable to conform to the proof (Rule 15 B). In truth, however, it will be remembered that the plaintiffs requested this amendment in the course of the trial, and it is not doubted that the court intended to grant it if it

had deemed the plaintiffs entitled to any recovery at all.

Respectfully submitted,
FRANK J. BARRY,
448 S. Hill Street,
Los Angeles, California.
CONNER & JONES,
By GERALD JONES,
303-6 Valley Bank Building,
Tucson, Arizona.
Attorneys for Plaintiffs.

Copy rec'd this 18th day of October, 1943.

F. E. FLYNN,
U. S. Attorney.

[Endorsed]: Filed Oct. 18, 1943. [132]

In the United States District Court
For the District of Arizona

May 1943 Term

At Tucson

Minute Entry of
Monday, November 29, 1943
(Tucson Division)

Honorable Albert M. Sames, United States District
Judge, Presiding.

[Title of Cause.]

Civ.-99

Plaintiffs' motion for new trial, to strike and amend findings of fact, conclusions of law, and for

judgment for plaintiffs comes on for hearing this day.

John P. Dougherty, Esquire, Assistant United States Attorney, is present for the defendant. Gerald Jones, Esquire, and Frank J. Barry, Esquire, are present for the plaintiffs.

Said motion is now duly argued by the respective counsel, and

It Is Ordered that said motion for a new trial, to strike and amend findings of fact, conclusions of law, and for judgment for plaintiffs be and the same is denied. [133]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Martin Culjak and Joseph Zelko, co-partners in business under the firm name and style of Culjak & Zelko, plaintiffs in the above entitled action, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment rendered in the above entitled court and cause on the 6th day of October, 1943, which said judgment became final and appealable on November 29, 1943 by the order of the above entitled court denying the said plaintiffs' motion for new trial, to strike and amend

findings of fact and conclusions of law, and for judgment for plaintiffs.

FRANK J. BARRY,
448 S. Hill Street,
Los Angeles, California.

CONNER & JONES,

By GERALD JONES,
303-6 Valley National Build-
ing, Tucson, Arizona.
Attorneys for Plaintiffs.

Copy Received 2-25-44.

JOHN P. DOUGHERTY,
Asst. U. S. Atty.

[Endorsed]: Filed Feb. 25, 1944. [134]

[Title of District Court and Cause.]

DOCKET ENTRIES

Date	Plaintiff's Account	Received	Disbursed
8/22/41	Conner & Jones	15 00	
9/30/41	Treas. US Tr-1-Tuc		10 00
12/31/43	Treas. US Tr-2-Tuc		5 00
		<hr/> 15 00	15 00

Abstract of Costs

To Whom Due	Amount
Marshal's fees	50
Deposition	2 50
Attorney's docket fee	10 00

[135]

1941

Aug. 22—File complaint.

Aug. 22—File praecipe for summons.

Aug. 22—Issue summons.

Aug. 26—File Summons with return on service of Writ executed thereon.

Sep. 9—File defts' mo for more definite statement and for Bill of Particulars, and memo in support thereof.

Sep. 15—File pltf's response to mo for more definite statement and bill of Particulars.

Oct. 3—File stipulation of counsel for defts that the United States Attorney be substituted as counsel for the defts herein.

Oct. 6—On mo Dougherty, order enter U.S. Attorney as Attorney for defts herein in place of Bilby & Shoenhair, & Strouss & Strouss, pursuant to consent filed by said attorneys for defendants. Mo. Dougherty, Order grant motion for Bill of Particulars filed herein & direct U.S. Attorney prepare order therefor specifying matter to be covered by said bill of particulars.

Nov. 3—Enter & file Order for plaintiffs to furnish defts. attorney with Bill of Particulars.

Nov. 5—Issue copy of Order to furnish Bill of Particulars to John P. Dougherty, Asst. U.S. Attorney for service on counsel for plaintiff.

1941

- Nov. 5—File copy of order to furnish bill of particulars with plaintiff's acknowledgment of service thereon.
- Nov. 13—File pltfs. Bill of Particulars.
- Nov. 21—File stipulation extending time of defendants to answer to December 8, 1941.
- Dec. 8—File stip that defts have to 12/18/41 to plea.
- Dec. 16—File stip that defts have to 1/10/42 to plea or answer.

1942

- Jan. 10—File defendants' answer.
- Jan. 17—File pltfs' motion that cause be set down for trial before jury.
- Jan. 26—Dougherty for Govt; no other appearance, Order pass pltfs motion for trial setting to Feb. 2, 1942 at 10 a.m.
- Feb. 2—On for trial setting; Dougherty pres; Jones pres; Order pass for setting until parties are ready. [136]
- Mar. 24—File stipulation to take depositions of Harry C. Collins, W. A. Brownfield and L. H. Snelling, witnesses on behalf of the defendants.
- Apr. 17—File supplementary stipulation to take depositions as to manner of questioning witnesses Harry C. Collins, W. A. Brownfield and L. H. Snelling.
- Apr. 29—File stipulation to take deposition of C. P. Wherren.

1942

- May 6—File assignment of claim and/or judgment; from Culjak and Selko to Ward Thomas, etc.
- Oct. 17—File depositions of Harry C. Collins, W. A. Brownfield and L. H. Snelling.
- Nov. 5—File stipulation relative to deposition of Ward A. Brownfield.

1943

- Jan. 20—File assignment of claim and judgment from Great Indemnity Company to Meriwether Investment Company.
- Apr. 23—File stipulation re cost of labor and material employed in repairing trenching machine.
- May 15—Order set this case for trial Monday, June 14, 1943 at ten a. m. (Issue notice to counsel)
- June 2—File subpoena with Marshal's return showing service upon Don Cavagaugh.
- June 14—On for trial; Dougherty pres; no other appearance; Mo Dougherty, Order pass for trial to follow C-9580-Tuc.
- June 17—On for trial; Jones pres for pltfs; Dougherty pres for defts; Burgess sworn as reporter; Both sides announce ready; Mo Jones, Dougherty consenting, Order complaint amended by interlineation, Page One, Line 6, 1st paragraph to insert words "Citizen and" after words "plaintiff is a" and in last line on Page One words "Citizen and" following words "struction Co.

1943

is a''; Jones moves to amend prayer to recite that plaintiffs seek to recover sum of \$5100.38, Dougherty resists; Order motion submitted. Counsel now stipulate that a jury is waived herein. On stipulation of counsel, Order amend complaint by striking word "hour" in line 24, words "per week" and "per month" in line 25 of last page of complaint being marked Exhibit A, page 7; On stipulation counsel, Order amend complaint Page 2, paragraph IV second line by interlineation of word "or" following words "Necessary [137] minor"; Enter proceedings of trial; at 5:15 p.m. recess to 6/18/43.

June 18—All present; Enter further proceedings of trial; at 5:08 p.m. recess to 6/19/43, at 10 a.m.

June 19—All present; Enter further proceedings of trial; Case argued to court; Counsel stipulate that the labor costs were divided 85% for installing tractor pads and 15% for installing chain links. Order allow pltf 10 days to file memo on rental value & allow deflt 10 days to ans.

June 25—File memorandum of plaintiffs.

July 6—File memorandum of defendants.

July 10—On stip counsel, Order allow pltf 10 days to file answering brief. (Issue notice to counsel)

July 17—File reply memorandum of plaintiffs.

1943

- July 28—File assignment from Meriwether Investment Company, Ltd. to Martin Culjak and Joseph Zelko.
- Aug. 31—Docket Order judgment for defendant entered 8/30/43 (Issue notice to counsel).
- Sep. 21—File defendants proposed findings of fact and conclusions of law.
- Sep. 28—File plaintiff's objections and proposed amendments and additions to proposed findings.
- Oct. 6—File defendant's (second draft) proposed findings of fact and conclusions of law.
- Oct. 6—File defendant's proposed form of judgment.
- Oct. 7—Dougherty pres; no other appearance; Order pltf's objection to proposed findings denied except there be added to #3 of proposed findings "That when said machine was delivered to defts it was in condition to render efficient, economic and continuous service" and that word "continuous" be stricken from #8 last line page 2 of proposed findings. Order reengrossed form of findings presented by Dougherty approved and filed; Order form of judgment presented by Dougherty entered, filed and spread on minutes as judgment.
- Oct. 7—File Findings of fact & conclusions of law (see paper #30).
- Oct. 7—Enter & file judgment for defendants (see paper #31).

1943

- Oct. 11—Docket Govts. memo of costs, etc., with notice to be [138] taxed October 13, 1943.
- Oct. 13—Tax costs as claimed by defendants in sum of \$13.00 and enter in J.D. and form of judgment.
- Oct. 18—File pltf's motion for new trial, to strike and amend findings of fact, conclusions of law, and for judgment for plaintiffs.
- Oct. 22—File pltf's notice of hearing of pltf's motion for new trial, to strike and amend findings of fact, conclusions of law, and for judgment for pltf's—for Monday, November 8, 1943, at ten a.m.
- Nov. 8—Order continue Pltf's motion for new trial etc., to November 29, 1943.
- Nov. 8—File receipt of Court reporter for Plaintiff's exhibits 1, 2, 3, and 4.
- Nov. 29—Plaintiff's motion for new trial, to strike and amend findings of fact, conclusions of law, and for judgment for plaintiffs on for hearing; Dougherty pres; Jones pres; Barry pres; Motion argued by respective counsel and ordered denied.

1944

- Feb. 25—File plaintiffs' notice of appeal.
- Feb. 25—File plaintiffs' bond on appeal in sum of \$250.00 with General Casualty Company of America as surety thereon.
- Feb. 25—Deliver copy of notice of appeal to office of United States Attorney, Tucson, Arizona, counsel for defendants.

1944

Feb. 26—File stipulation as to record on appeal.

Feb. 26—Enter & file order to send up original paper to CCA, to wit: Ex. 1.

Mar. 29—Docket condensed narrative of testimony filed March 24, 1944.

Mar. 29—Docket reporter's transcript of testimony in three parts filed March 24, 1944.

Mar. 30—Enter & file order extending time for filing record on appeal to 4/24/44.

Mar. 30—Issue notice to counsel.

Apr. 19—Enter & file order directing Clerk to forward reporter's transcript with record on appeal.

Apr. 19—Prepare record on appeal—429 folios @ 5c. [139]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It Is Hereby Stipulated that the record, proceedings, and evidence to be included in the record on appeal in this matter are as follows:

- (1) Complaint; and Stipulation filed April 23, 1943.
- (2) Order to Furnish Bill of Particulars
- (3) Fill of Particulars
- (4) Answer
- (5) Findings of Fact and Conclusions of Law
- (6) Direction for Entry of Judgment

(7) Judgment

(8) Motion for New Trial, to Strike and Amend Findings of Fact, Conclusions of Law, and for Judgment for Plaintiffs

(9) Minute Entry denying Motion mentioned in number (8) above

(10) Notice of Appeal and proof of Notification [140]

(11) Transcript of the Evidence

(12) Condensed Statement in Narrative Form of all Testimony

(13) Exhibits, as follows: 1, 2, 3, and 4

(14) All Docket Entries

(15) This Stipulation

It Is Further Stipulated that the appellants shall not be required to file any statement of the points on which they intend to rely on the appeal as the record is deemed by the parties to be complete.

The parties hereto join in requesting that the Condensed Statement of the Testimony mentioned in item (12) above, rather than the Transcript of the Evidence mentioned in item (11) above, be printed as a part of the Transcript of Record.

Dated February 26, 1944.

FRANK J. BARRY

448 South Hill Street

Los Angeles, California

CONNER & JONES

By GERALD JONES

303-6 Valley National Build-
ing, Tucson, Arizona.

Attorneys for Plaintiffs

FRANK E. FLYNN

United States Attorney

JOHN P. DOUGHERTY

Assistant U. S. Attorney

Tucson, Arizona

Attorneys for Defendants.

[Endorsed]: Filed Feb. 26, 1944 [141]

In the United States District Court
For the District of Arizona

November 1943 Term

At Tucson

Minute Entry of

Thursday, March 30, 1944

Honorable Albert M. Sames, United States District
Judge, Presiding

Civ-99

[Title of Cause.]

ORDER EXTENDING TIME

On the motion of John P. Dougherty of counsel
for the defendants in the above-entitled case, it is

hereby ordered that the time for filing the record on appeal and docketing the action be, and the same is, hereby extended to and including the 24th day of April, 1944.

Dated: March 30, 1944.

ALBERT M. SAMES

United States District Judge

[142]

[Title of District Court and Cause.]

ORDER TO FORWARD DUPLICATE ORIGINAL OF REPORTER'S TRANSCRIPT

On motion of Gerald Jones, Esquire, counsel for the Plaintiff,

It Is Ordered that the Clerk forward with the record on appeal herein a duplicate original of the reporter's transcript of testimony certified by the reporter as being correct and filed by the reporter in these proceedings.

Dated at Tucson, Arizona, this 19th day of April, 1944.

ALBERT M. SAMES

Judge

[Endorsed]: Filed April 19, 1944. [143]

In the United States District Court
For the District of Arizona

CLERK'S CERTIFICATE
TO TRANSCRIPT OR RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court including the records, papers and files in the case of Martin Culjak, et al, Plaintiff, versus Del E. Webb, et al, Defendant, Case No. Civil-99-Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 143, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid, together with a duplicate original of the reporter's transcript certified by the reporter in three volumes and original Exhibit 1 introduced at the trial of said cause which are transmitted herewith as called for and designated in the Stipulation as to Record filed in said cause and made a part of the transcript attached hereto.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$21.95 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the Seal of said Court
this 19th day of April, 1944.

[Seal] EDWARD W. SCRUGGS,
Clerk. [144]

[Endorsed]: No. 10748, United States Circuit
Court of Appeals for the Ninth Circuit. Martin
Culjak and Joseph Zelko, co-partners in business
under the firm name and style of Culjak & Zelko,
Appellants vs. Del E. Webb, doing business under
the name and style of Del E. Webb Construction
Co., and White & Miller, Contractors, Inc., a cor-
poration, Appellees. Transcript of Record. Upon
Appeal from the District Court of the United
States for the District of Arizona.

Filed April 24, 1944.

PAUL P. O'BRIEN,
Clerk of the United States
Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10748

MARTIN CULJAK and JOSEPH ZELKO, co-
partners in business under the firm name and
style of CULJAK & ZELKO,

Appellants,

vs.

DEL E. WEBB, doing business under the name
and style of DEL E. WEBB CONSTRU-
TION CO., and WHITE & WILLARD, CON-
TRACTORS, INC., a corporation,

Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF RECORD NECES-
SARY FOR THE CONSIDERATION
THEREOF; PURSUANT TO SUBDIVI-
SION 6 OF THE 19th RULE OF THIS
COURT

Appellants herein, who appeal to this court from the judgment entered on October 6, 1943, which became final and appealable on November 29, 1943 by the order of the court denying appellants' motion for a new trial, all entered in United States District Court for the District of Arizona, at Tucson, in said District, in suit numbered Civil-99-Tucson, wherein appellants were plaintiffs and appellees were defendants, adopt as their designation of parts of the record necessary on this appeal

the Stipulation As To Record signed by counsel for the respective parties and filed in the court below, the same having been transmitted to this court as a part of the record.

As appears from said stipulation, the entire record is before this court. Appellants will nevertheless state the points upon which they will rely, as follows:

The appellants contended below, and will contend in this court, that——

1) By the undisputed evidence in this case they were entitled to a judgment of \$4,166.80.

2) That the contract involved in this case required the defendants to make all necessary minor and field repairs required during the use of the trenching machine by the defendants; that on the undisputed evidence in this case the defendants did not make all necessary minor or field repairs required during their said use; and that the damages occasioned to the plaintiffs by reason of the failure of said defendants to comply with their said contract amount to \$4,166.80.

3) That the said contract was intended to and did by its terms impose upon the defendants the duty to return said trenching machine at the end of the lease period in the condition in which it was admitted to have been received, to wit, “to render efficient, economic and continuous service”, ordinary wear and tear excepted, and that the undisputed evidence in the case is that the said machine, when returned, was not in a condition to render efficient, economic or continuous service, ordinary

wear and tear excepted, and that the damages of the plaintiffs, by reason of such failure on the part of the defendants, was the sum of \$4,166.80.

4) That the court below erred in construing said contract to require of defendants the sole duty to return the said machine in a condition to be operated, regardless of the fact that such operation was inefficient, uneconomic or non-continuous.

5) That the court below erred in refusing to permit the plaintiffs to amend their complaint to allege additional damages by reason of structural injuries to the trenching machine, the ruling of the court being that if such amendment were permitted a continuance of the case would have to be granted to the defendants. Plaintiffs respectfully take the position that there was no element of surprise involved and that the amendment should have been allowed.

6) That the court erred in the matter set forth in the plaintiffs' "motion for a new trial, to strike and amend findings of fact, conclusions of law, and

for judgment for plaintiffs'', the said motion being duly incorporated in this record.

Respectfully submitted,

FRANK J. BARRY

448 S. Hill Street

Los Angeles, California

CONNER & JONES

By GERALD JONES

303-6 Valley National Building,
Tucson, Arizona

Attorneys for Appellants.

Copy received May 9, 1944.

N. E. FLYNN

U. S. Attorney,

L.

[Endorsed]: Filed May 12, 1944, Paul P. O'Brien, Clerk.



No. 10748.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARTIN CULJAK AND JOSEPH ZELKO, co-
partners in business under the firm name
and style of CULJAK & ZELKO,

Appellants,

vs.

DEL E. WEBB, doing business under the
name and style of DEL E. WEBB CON-
STRUCTION Co., and WHITE & MILLER,
Contractors, Inc., a corporation,

Appellees.

BRIEF OF APPELLANTS.

FILED

JUL 17 1944.

FRANK J. ~~BRADY~~ P. O'BRIEN,
Los Angeles, California; ^{CLERK}

CONNER & JONES,

By GERALD JONES,

Tucson, Arizona,

Attorneys for Appellants.

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No. 10748.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARTIN CULJAK AND JOSEPH ZELKO, co-
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Appellants,

vs.

DEL E. WEBB, doing business under the
name and style of DEL E. WEBB CON-
STRUCTION Co., and WHITE & MILLER,
Contractors, Inc., a corporation,

Appellees.

BRIEF OF APPELLANTS.

Jurisdictional Statement.

Throughout this brief the parties will be referred to as "plaintiffs" and "defendants."

This appeal is taken from a judgment of the District Court of the United States in and for the District of Arizona, at Tucson, entered and filed October 7, 1943 [R. 138-139], in that certain action wherein Martin Culjak and Joseph Zelko, each a citizen and resident of the County of Los Angeles, State of California, were plaintiffs in a complaint [R. 2-5] praying for a money judg-

ment in the sum of \$3600.38 against Del E. Webb, a citizen and resident of the County of Maricopa, State of Arizona, and White & Miller, Contractors, Inc., an Arizona Corporation with its principal office and place of business at the County of Pima, State of Arizona, defendants; and from the order of said United States District Court, rendered and made on November 29, 1943, denying plaintiffs' motion for a new trial, to strike and amend findings of fact, conclusions of law and for judgment for plaintiffs [R. 140-144].

The Notice of Appeal to this Court was duly served on defendants, filed in said United States District Court on February 25, 1944 [R. 144-145]. Plaintiffs' bond on appeal was filed on February 25, 1944.

The jurisdiction of said United States District Court arose from Article III, Section 2, Constitution, and Section 24, Judicial Code, as amended (Section 41, U. S. C. A.). The jurisdiction of this Court arises by virtue of Section 128, Judicial Code, as amended (Section 225, U. S. C. A.).

Statement of the Case.

Plaintiffs owned an Austin Trenching Machine valued at \$20,000.00. In the latter part of November, 1940, an agent of the defendants named Morrison entered into negotiations with the plaintiff Martin Culjak for the rental of said machine for use in digging trenches for sewer and water lines at Fort Huachuca, Arizona. Culjak did not know where Fort Huachuca was. He asked Morrison if there was any rock in the ground, and Morrison said, "No rock, but some hard clay." Culjak then said, "If that is the case, I rent you the machine."

There was no written contract when the machine was delivered to defendants. About a week or ten days thereafter, the written contract attached to plaintiffs' complaint as Exhibit A was forwarded by defendants to plaintiffs [R. 28-30].

The machine at the time of its delivery to defendants was in first-class condition throughout [R. 81, 118].

The contract provided that all necessary minor or field repairs to the machine while in use by defendants should be made by defendants without cost to the plaintiffs, and that other than minor or field repairs should be made by plaintiffs without cost to defendants [R. 7]. The machine was to be operated by employees of the defendants [R. 7].

The machine was returned to plaintiffs at Los Angeles the latter part of April, 1941, in a badly damaged condition [R. 53].

On May 7, 1941, plaintiffs wrote a letter to defendants calling their attention to the damaged condition of the machine upon its return to plaintiffs, and asking defendants to make certain necessary specified repairs thereon [R. 35].

Defendants, upon receipt of plaintiffs' letter, requested Harry C. Collins, a machinery expert in Los Angeles, to inspect the machine and report its condition and the necessary parts to put it in first-class operating condition [R. 72].

Collins made an inspection of the machine on Sunday, May 11, 1941, at Van Nuys, California. He found the track pads which carry the machine and guide it along the ground badly bent. The wooden parts of these pads

were broken down and the steel casings which enclosed those wooden parts had heavy indentures. His examination disclosed that the surfaces of the multipedal pads exposed to the road or the surface of the ground were indented at irregular points on each tread. It was his opinion that pads in that condition would not run true and would not carry the machine in a straight line. He found the excavating chain links bent in places and stretched out of pitch so that they did not properly connect and go over the sprocket they were intended to go over, but would jump off and break. He found other parts of the machine in damaged condition. He made a written report of his findings and recommendations to defendants, in which he stated that he found 102 links of the excavating chain bent, drawn out of shape or worn down to a point where they were dangerous to operate, and 82 tractor or multipedal pads "all in very poor condition" [R. 72-76].

Defendants notified plaintiffs in the latter part of June or first of July, 1941, that they would not make any repairs to the machine. The plaintiffs thereupon engaged an attorney who, on July 8, 1941, wrote to defendants urging them again to make the necessary repairs, it being the desire of plaintiffs to have defendants themselves, rather than plaintiffs, repair the machine [R. 64-65]. Neither the attorney for plaintiffs, nor plaintiffs themselves got any reply to or acknowledgment of the said letter of July 8, 1941. On July 26, 1941, plaintiffs gave an order for the necessary repair parts which were furnished about thirty days later and then installed.

The parties stipulated that materials and parts, of the value of \$2021.05, were purchased and used in making

repairs and that the labor cost of said repairs was \$498.75, but defendants did not admit that all of said labor and materials were necessary to place the machine in good order [R. 17-19, 23]. It took 30 days to repair the machine [R. 38].

At the time the machine was returned from Fort Huachuca to plaintiffs, plaintiffs were engaged in excavation work for sewers upon which they needed the machine. In order to make it operate, pending repairs, even in the soft loam ground where this excavation work was being done, plaintiffs had to take out every other tooth in the sprocket. When those sprocket teeth were removed, the excavator chain still jumped the sprocket at times [R. 39, 56]. This excavation work was being done on a new subdivision and not on a paved street [R. 39]. It could not be used on a job that had pavement because the damaged track pads would dig up the pavement. When the machine came back from Fort Huachuca, the damaged track pads of the caterpillar roller upon which the machine traveled over the ground would buckle up and the caterpillar roller would then slide and pull the machine off the line it was intended to follow. Several times it had to be pulled out of the trench, backed up and set straight [R. 39, 55-56]. Before going to Fort Huachuca, the machine would not damage pavements [R. 33].

Although plaintiffs had it on the ground where the sewer work was being done from the end of April, 1941, to sometime in July, 1941 [R. 43-44, 113], it actually was operated only about 80 hours during that time, running at different times a few hours a day [R. 124] and being moved from one place to the other by truck and trailer [R. 129].

The plaintiffs could have rented the machine at in excess of \$1500.00 per month during the time it was being repaired [R. 39-40].

The bill of particulars filed in the case alleged that for making said repairs 82 multipedal slats and bolts, 2 idler shafts and 150 excavator chain links were purchased. The correct number of excavator chain links actually installed, however, was 180, of which 30 links were taken from plaintiffs' own supply [R. 32, 37].

Defendants' answer admitted the allegations of the complaint as to the lease and the good condition of the machine when leased, but denied that it was returned in a damaged condition or that plaintiffs were damaged [R. 2-22].

The case was tried without a jury. At the conclusion of the trial the Court apparently was satisfied from the evidence which was uncontradicted on material points that plaintiffs were entitled to damages in the amount expended for materials and labor for repairing the machine because the Court requested plaintiffs to file a memorandum *only* upon the plaintiffs' right to rental for the machine while being repaired [R. 149]. However, judgment was ordered for defendants and proposed findings of fact and conclusions of law were prepared and filed by defendants [R. 133-136]. Objections to these were duly filed by plaintiffs and were by the Court denied [R. 137]. Upon the entry of the judgment, plaintiffs filed a motion for a new trial, to strike and amend findings of fact, conclusions of law, and for judgment for plaintiffs which the Court denied [R. 140-143]. Notice of appeal to this Court was thereupon duly given by plaintiffs [R. 144-145].

Findings of Fact.

Briefly stated the findings of fact were substantially as follows:

(1) A finding of diversity of citizenship and that the claim involved exceeded \$3000.00.

(2) A finding that plaintiffs and defendants entered into a contract of lease as alleged in the complaint.

(3) A finding as to the date of the purchase of the machine by plaintiffs, the extent of its use by plaintiffs before its lease to defendants and that "when said machine was delivered to defendants it was in a condition to render efficient, economic and continuous service."

(4) A finding that the contract provided that "All necessary minor or field repairs to equipment shall be made by the lessee without cost to the lessor. Other than minor or field repairs shall be made by the lessors without cost to the lessee."

(5) A finding that in December, 1940, the machine was transported by defendants at their expense from Los Angeles, California, to Fort Huachuca, Arizona.

(6) A finding that the machine was operated at Fort Huachuca by defendants from its arrival until on or about April 7, 1941.

(7) A finding "That during the time said machine was at Fort Huachuca, the defendants furnished and paid the operators thereof and in addition expended the sum of \$4,211.13 for parts and labor in making all the necessary or minor field repairs to keep the machine in running condition, and also paid the sum of \$8,250.00 in rentals.

(8) A finding "That at the termination of said operations the necessary minor or field repairs were made on the machine and it was then returned to the plaintiffs at Los Angeles at defendants' expense, and shortly thereafter, on April 28, 1941, it was placed in operation by plaintiffs on the Longridge sewer job at Van Nuys, California, where it was operated until May 7, 1941, when it was moved over to the Magnolia Boulevard job and operated there until May 13, 1941, and was then moved back to the Longridge job and kept in operation there until the completion of said job on July 21, 1941 when it was returned to plaintiffs' yards in Los Angeles."

(9) A finding "That the plaintiffs made no repairs on said machine until the period from August 28 to September 16, 1941, when they made major repairs on it at their yards in Los Angeles, California."

Conclusions of Law.

The conclusions of law were:

(1) "That the defendants, in accordance with the terms of the contract, made all necessary minor or field repairs before delivering said machine to plaintiffs.

(2) That the plaintiffs are not entitled to the damages prayed for in their complaint or at all.

(3) That the defendants are entitled to a judgment for their costs to be taxed herein against the plaintiffs and judgment is hereby ordered to be entered accordingly."

Specifications of Error.

Plaintiffs make the following assignments of error:

1. The Court erred in making finding of fact 3, wherein it is stated, "that said machine was purchased by said plaintiffs and Pat Devine in 1930, and was operated about 10 or 11 months between 1930 and 1940, and for the last seven years of that time had stood idle in plaintiffs' yards at Los Angeles, and no repairs were made on the machine during those ten years" [R. 134], in that said finding is immaterial and misleading and was not an issue in the case.

2. The Court erred in making finding of fact 7, wherein it is stated, "that during the time said machine was at Fort Huachuca, the defendants furnished and paid the operators thereof and in addition expended the sum of \$4,211.13 for parts and labor in making all the necessary or minor field repairs to keep the machine in running condition, and also paid the sum of \$8,250.00 in rentals" [R. 134-135], in that said finding is immaterial and was not an issue in the case.

3. The Court erred in making that portion of finding of fact 8, wherein it is stated, "that at the termination of said operations, the necessary minor or field repairs were made on the machine" [R. 135], in that said portion of said finding is not supported by any evidence and is contrary to the undisputed evidence in the case.

4. The Court erred in making that portion of finding of fact 8, wherein it is stated that "on April 28, 1941, it (the machine) was placed in operation by plaintiffs on the Longridge sewer job at Van Nuys, California, where it was operated until May 7, 1941, when it was moved

over to the Magnolia Boulevard job and operated there until May 13, 1941, and was then moved back to the Longridge job and kept in operation there until the completion of said job on July 21, 1941, when it was returned to plaintiffs' yards in Los Angeles" [R. 135], in that said portion of said finding is immaterial and not involved in any issue in the case, and is uncertain and misleading.

5. The Court erred in making finding of fact 9, wherein it is stated "that the plaintiffs made no repairs on said machine until the period from August 28 to September 16, 1941, when they made major repairs on it at their yards in Los Angeles, California" [R. 135], in that said finding is immaterial and not involved in any issue in the case, and is misleading.

6. The Court erred in making conclusion of law 1, wherein it is stated, "that the defendants, in accordance with the terms of the contract, made all the necessary minor or field repairs before delivering said machine to plaintiffs" [R. 135], in that said conclusion is contrary to the law and the evidence and is not supported by any law or evidence.

7. The Court erred in making conclusion of law 2, wherein it is stated, "that the plaintiffs are not entitled to the damages prayed for in their complaint or at all," in that said conclusion is contrary to the law and the evidence and is not supported by any law or evidence.

8. The Court erred in making conclusion of law 3, wherein it is stated, "that the defendants are entitled to

a judgment for their costs to be taxed herein against the plaintiffs and judgment is hereby ordered to be entered accordingly” [R. 135-136], in that said conclusion is contrary to the law and the evidence and is not supported by any law or evidence.

9. The Court erred in refusing to permit plaintiffs to amend their complaint at the trial to permit proof of additional damages arising from injuries sustained by said machine while in the possession of defendants which defendants had not repaired and which damages by inadvertence had not been specially pleaded, unless plaintiffs would consent to a continuance of the trial [R. 54-55], in that said refusal was arbitrary and unjust and an abuse of the Court’s discretion.

10. The Court erred in failing to award judgment for plaintiffs, in that the law and undisputed evidence showed plaintiffs to have been damaged in the sum of at least \$4,166.80 and entitled to judgment for at least that amount.

11. The Court erred in denying plaintiffs’ motion for a new trial, to strike and amend findings of fact and conclusions of law, and for judgment for plaintiffs [R. 140-143].

ARGUMENT.

Three basic questions of fact and two questions of law are involved in this case.

Facts.

(1) What was the condition of the trenching machine when leased by plaintiffs to defendants?

(2) What was the condition of the machine when returned by defendants to plaintiffs?

(3) What repairs, if any, were necessary to be made upon said machine upon its return to plaintiffs?

Law.

(4) What was the obligation of the defendants, under the contract of lease, with reference to repairs of the machine?

(5) Was there abuse of discretion by the trial court in refusing to permit a trial amendment of the complaint to allow proof of other injuries to the machine not specifically pleaded?

Argument upon these five questions will cover all the specifications of error heretofore assigned.

POINT I.

First Assignment of Error.

What Was the Condition of the Machine When Leased to Defendants?

Finding of fact 3 states that the machine was purchased by plaintiffs in 1930, was operated about 10 or 11 months from 1930 to 1940, and for the last seven years of that time stood idle in plaintiffs' yards at Los Angeles, and no repairs were made on the machine during those ten years [R. 134].

The purpose of this finding must have been to establish as a fact that, because the machine had had no repairs for ten years and had stood for the last seven years in plaintiffs' yards—inferentially, in the open weather,—it must have been ready to fall apart when leased to defendants. If this was not the purpose of the finding, then the finding was wholly immaterial.

It is true the machine "stood in the yards" of the plaintiffs during many years of the pre-war depression when contract work was practically halted; but it was stored in a galvanized shed, well protected. The tracks were planked up with 12 inch planks [R. 41, 48, 57].

The track pads could not have become deteriorated by age because the wood which was encased in steel was specially prepared. Devine testified: "The wood in those pads is oak or hickory. This wood is first kiln-dried to take the shrinkage out of it. They then put it in a press and drive it through a frame press, small at one end and

bigger at one end, and they press it through that. That's to take up any slack in it. They undertake to thoroughly dry the wood. They next put it in a big vat of linseed oil, to save it from expansion, contraction or rot and also to waterproof it. This is done to protect it from rotting or expansion. If it is waterproofed, it will not take up water and will not expand. "That wood is thoroughly dried before it is put in the pad. It will last for years. You could bury it in the ground and it would last for years,—fifty years—because it cannot take up any moisture." [R. 126.]

The machine was new when plaintiffs purchased it after having been used only about six weeks by a previous purchaser who had defaulted in his payments [R. 47-48]. Pat Devine, a co-owner of the machine, watched out for the machine while it was stored [R. 57, 61]. If it had not had any repairs during the ten years plaintiffs owned it, it must have been because it needed no repairs. It had done an aggregate of only 10 or 11 months' work during those 10 years and such work was in and about Los Angeles in soft soil without rocks [R. 62].

The evidence as to its excellent condition when leased to defendants is wholly undisputed. The most convincing testimony in that respect was given by witnesses on behalf of the defendants.

Harry C. Collins testified that when he inspected the machine for a prospective lessee 30 days before its delivery to defendants (and it was not operated in the meantime) he found it "in first-class condition throughout. . . . The tractor pads were in first-class condition. They showed no appreciable wear." This was true also as to the buckets and gears and engine [R. 81].

W. A. Brownfield testified that “the machine was in very good shape at the time it was delivered at the project” [R. 96].

Dan Cavanaugh testified he saw the machine when it came on the job and that “it was in very good condition” [R. 117-118].

Defendants valued the machine in the lease contract at \$20,000.00 [R. 14]. In their answer [R. 22], they admitted the allegation of the complaint that when received by them it was “in a condition to render efficient, economic and continuous service” [R. 4]; yet in their original draft of finding 3 they omitted this admission and only included it upon the special order of the Court [R. 137]. It is not necessary to add to this evidence the testimony of plaintiffs’ witnesses on that matter [R. 31, 32, 33, 49].

POINT II.

Second, Third and Sixth Assignments of Error.

What Was the Condition of the Machine When Returned to Plaintiffs?

Finding of fact 7 stated that while the machine was at Fort Huachuca, the defendants paid the operators thereof and also paid \$8250.00 in rentals [R. 134-135]. No issue was raised in the action as to the payment of the operators or for rentals. Consequently, said findings were wholly immaterial.

Finding of fact 7 further states that defendants expended \$4211.13 for parts and labor in making all the necessary or minor field repairs to keep the machine in running order [R. 134-135]. The amount of money paid by defendants for repair of the machine was not an issue in the case, and, so, this finding was also immaterial. But

if it was intended to imply by said finding that all necessary minor or field repairs had been made on the machine when it was returned to plaintiffs, then such finding was contrary to all evidence in the case and was not supported by any competent evidence; and this is true of conclusion of law 1 [R. 135].

The undisputed evidence is that when the machine was returned to plaintiffs, it was, as the complaint alleged, "in a damaged, deteriorated and unfit condition and was not in a condition to render efficient, economic and continuous service" [R. 4].

(a) PLAINTIFFS' WITNESSES:

Martin Culjak, one of the plaintiffs, testified that when he saw the machine at the Southern Pacific Freight Depot in Los Angeles upon its return from Arizona, he just glanced over it and could see all the chains were bent and the buckets shot [R. 33]. He saw the multipedal pads were in bad condition, pretty well shot. The wooden blocks inside were all stripped and the iron cover on the pads was all bent in different directions. The buckets were all patched up and there were loose rivets on the caterpillar links. They were pretty well bent and stretched out of shape [R. 34]. Culjak testified that plaintiffs could not use the machine on any job that had pavement because the damaged and bent track pads would dig up the pavements and they couldn't use it economically even on unpaved ground because it pulled off to one side and they had extra work to get the ditch right [R. 39]. The transmission gears were stripped, he said, and the transmission shaft was cracked [R. 42-45].

Pat Devine, another witness for plaintiffs and a co-owner of the machine, produced one of the damaged track

pads at the trial. It was too cumbersome to be offered in evidence. He testified that said damaged track pad was all cracked up and spread too wide; that when the damaged pads lie flat on the surface, they buckle together, owing to the spread and because there is no play between the pads. He said the damaged pad he exhibited in Court was all dented and would cut up the streets, and that if used on dirt surfaces one would have to build the filler and bring it up to pitch [R. 50]. As to the remaining 81 pads in the machine when it got back from defendants, 65 of them would fall apart. They were mostly worse than the sample he had in Court, but some may have been a little better. He had to go through a whole pile of them to get one that was whole [R. 51].

Not many of the 180 links on the excavator chain were good when plaintiffs got the machine back. Some of them would look good until you tapped them to see whether they were fractured or not. Ten or eleven links out of the 180 could be used by changing the pins and bushings [R. 57].

Also the upper structure of the boom had been pulled down and this threw the tail block 3 inches off from the center of the ditch [R. 53].

(b) DEFENDANTS' WITNESSES:

Harry C. Collins, who at the request of defendants, made a special inspection of the machine, soon after it returned to Los Angeles, testified that he found the track pads which carry the machine badly bent. The wood parts were broken down and the steel casing over the wood had heavy indentures putting them out of shape. Pads in that condition, he said, would not run true [R. 72]. The excavator chain links were bent and pulled out of pitch. When out of pitch the chain will jump off the sprocket

[R. 73]. Some of the links were elongated so that they would not mesh with the teeth of the sprocket. The idler rolls that guide the chain were badly worn [R. 74].

W. A. Brownfield testified that the pads on the track were in "terrible shape." When the hinges were taken off the pads, the wood just all fell apart [R. 100]. The treads on the track were pretty badly mashed up [R. 101]. He said he helped take the pads off the machine and saw the wood inside the pads fall to pieces. The pads were in much worse condition than ordinary wear and tear would make them [R. 102]. The pads at the time the machine was repaired at Fort Huachuca before being shipped back to Los Angeles were in very bad shape [R. 106]. The excavator chain was approximately 75% good, but he did not measure the links [R. 100]. Twenty-five percent of the links were in bad shape [R. 108], after 20 new links were placed on the chain by defendants at the conclusion of the operation [R. 109]. The 25% were bowed or bent and these would put an undue strain and wear on the head sprocket and would cause the other 75% to become damaged because if one link on one side of the sprocket is good and a link on the other side is stretched, the whole chain is pulled out [R. 110]. The witness called the damaged condition of the buckets to Mr. Cavanaugh's attention and told Cavanaugh plaintiffs would probably not accept the buckets [R. 110]. He also called Cavanaugh's attention to the treads on the track [R. 101].

The defendants relied at the trial mainly upon the testimony of Leslie H. Snelling as proving that all necessary minor or field repairs had been made by defendants on the machine, and that it was in good working condition when returned to plaintiffs. The direct testimony of this

witness was in the form of a general written statement prepared for his signature. In this statement he said, "So far as I could tell from watching the machine operate, it seemed to be in a reasonably good state of repair and in a condition where it would do the work it was supposed to do. I did not see anything that would indicate that the machine had been misused in Arizona. In any event, it was in good enough condition that it did the work when brought over here, without any major difficulty and no breakdowns of any consequence [R. 114].

However, on cross-examination, this witness testified that as a city inspector on sewer contract work he was not concerned with the manner of operation of a machine so long as the work was done according to specifications [R. 115]. He was not a mechanical engineer and knew nothing of the different parts of the machine [R. 115]. He was not offered, and did not qualify, as an expert witness. He said that the reason he stated in his written statement that the machine seemed to be in reasonably good condition when brought back from Arizona was that there were no breakdowns [R. 116]. He didn't even inspect the machine [R. 116] and never looked at the track pads [R. 117]. He did, however, call the attention of the contractors several times during the work to the fact that they were deviating from the line of the sewer and made them get back on the line [R. 116]. When asked on cross-examination what justification he had for the declaration in his written statement: "So far as I could tell from watching the machine operate, it seems to be in

a reasonably good state of repair and in a condition where it would do the work it was supposed to do. I did not see anything that would indicate that the machine had been misused in Arizona," he answered, "I didn't inspect it. I made that statement as they asked me. As a matter of fact, there could be a lot wrong with that machine and I would never know about it, even if I inspected it" [R. 116-117].

And on redirect examination by the defendants' counsel he further stated he never looked at the track pads on the machine. He attempted to explain the deviation of the machine from its course as due to either of two causes: the wet condition of the ground, or the fact that tracks on the digger were not even [R. 117]. However, since he was not qualified to give an expert opinion on the matter, his explanation has no value as evidence. But if it were to be considered at all, it must be assumed in the absence of proof, which does not exist to the contrary, that the ground was wet on both sides of the ditch and hence a 40 ton machine would be most unlikely to slide from one side to the other. The more likely reason, therefore, would be that the tracks of the digger—the multi-pedal track pads—were uneven and were, as testified by Devine [R. 55] buckling up and pulling the machine off its course. It is a matter of common knowledge that when one wheel of a machine, as an automobile, buckles or locks and is unable to revolve, the wheel on the opposite side turns the machine on the pivot of the locked wheel and away from its intended course.

Consequently, the testimony of Snelling cannot be taken as contradicting the testimony of the other competent witnesses or as proving that the machine was not in a damaged condition when it was returned to plaintiffs.

The witness, Dan Cavanaugh, was defendants' superintendent of the operations at Fort Huachuca. He does not contradict the testimony of Culjak, Devine and Browning as to the damaged condition of the machine when returned to plaintiffs. If anything, he supports it. He said with reference to the condition of the multipedal track pads when the machine was returned to plaintiffs, "I am sure if these wooden pads would have been good, we would not have the condition we have now" [R. 122], namely, the damaged condition described by the other witnesses. A more positive statement was, "I would not say, due to the terrain, that the damage done to those pads could be considered ordinary wear and tear" [R. 123].

The statements of Cavanaugh certainly acknowledge that the machine was returned in a damaged condition at least as far as the track pads were concerned.

The uncontradicted evidence establishes, therefore, that when the machine was returned to plaintiffs, it was in a damaged, deteriorated and unfit condition and was not in the condition in which it was received by the defendants, ordinary wear and tear excepted.

The extent of those damages will be discussed under the next point.

POINT III.

Fourth and Fifth Assignments of Error.

What Repairs Were Necessary Upon the Machine When Returned?

Finding of fact 8 states in part that on April 28, 1941, the machine, upon its return from Arizona was placed in operation on a sewer job in Van Nuys, California, where it was operated until May 7, 1941, when it was moved to another job and operated there until May 13, 1941, and was then moved back to the Van Nuys job and kept in operation there until the completion of said job on July 21, 1941, when it was returned to plaintiffs' yards in Los Angeles [R. 135]. Either this finding is immaterial, as not decisive of any issue in the case, or it is offered as a finding that when the machine was returned to plaintiffs, no repairs were necessary thereon.

Along the same line is finding of fact 9 which states that the plaintiffs made no repairs on said machine until the period between August 28 to September 16, 1941 when they made *major* repairs on it at their yards in Los Angeles [R. 135]. We have emphasized the word "major" because we will discuss later the implied contrast suggested thereby.

Both findings 8 and 9, as we understand them, were intended to declare that the machine was in good working order when returned to plaintiffs, having had all necessary minor or field repairs made thereon by the defendants, and that, therefore, no repairs were needed thereon, until plaintiffs between August 28 and September 16 made "major" repairs thereon. It must, however, be assumed that those major repairs were then needed. Otherwise almost \$3,000.00 would have been wasted by

plaintiffs since there was no profit or expectation of profit to them in making unnecessary repairs, and besides, since they did their level best to have defendants themselves make the repairs [R. 35-36, 64-65].

The implication of the two findings under this point is that because the machine was operated for some 9 or 10 days' actual work in soft loam [R. 39, 55, 61], after its return to plaintiffs it must have been in a condition to render efficient, economic and continuous service, and that because of having been operated for 9 or 10 days in soft loam, it became so damaged that it was necessary to make major repairs costing almost \$3,000.00 for parts and labor.

The machine was returned the last of April 1941. Approximately a week later, May 7, 1941, plaintiff Culjak wrote defendants a letter [R. 35-36] setting forth the injuries which he claimed the machine had suffered and asking defendants to make repairs. He was moderate in his request, in that he did not ask for any repairs to buckets and other damaged parts but only to those parts which were vital to the operation of the machine. At the time this letter was written, the plaintiffs had a sewer job in which a machine of the size of the machine just returned to them was needed. To rent a machine would cost them \$1500.00 which they might properly claim from defendants. But they desired to avoid such expense. Their operator Devine, with ingenuity characteristic of good American workmen, by makeshift adjustments, managed to get the machine to work, although defectively. Devine testified:

“After the trenching machine came back from Fort Huachuca, it was used by the plaintiffs. I operated it in Long Ridge Avenue and in Van Nuys.

It was there about 2 days, I guess. The ground was soft solid loam. I operated the machine there, but not very efficiently because the track pads would buckle up like this (illustrating), and the cat roller would come up and it would slide and it would go to the front end, pull off of the line for you. It pulled out several times and I had to go back up and straighten out before I could go ahead.

"I took every other tooth out of the sprocket in order to give it a slack, so it would not buckle up, and even if she would, I could handle her. It was a 6 point sprocket, 6 flat points, and then a square point, and the teeth are in the square point, and by taking the teeth out, I gave it slack.

"The sprocket was supposed to have 6 teeth in each for proper use. There were 12 on and I cut it down to 6. Then with the 6 teeth in the 2 sprockets, she jumped a sprocket twice on me. If the links were right she would not jump the sprocket. * * *

"It would not make a true straight trench. I slacked the chain off of it and put on 2,000 pounds in front as a counter-balance on the front end, to try to hold her in line. That was necessary to keep the front wheels from sliding and also I put grabs on the front wheels.

"When one track is locked, she will pull away—too much pressure on one side. That was due to the damaged condition of these pads" [R. 55-57].

This testimony is definitely supported by the machinery expert, Collins, who inspected the machine, not after it had finished the work on or about July 21, 1941, but on May 11, 1941, when the machine had done only 50 feet, "just probably a couple of hours' work" [R. 72]. Certainly, without definite proof, it cannot be inferred

that an operator like Devine who had operated this same machine during all the time it was operated while owned by the plaintiffs and who never in all that time broke even one link in the excavator chain or did any damage whatsoever requiring repairs to the machine [R. 53] would so damage it in 9 or 10 days' operation in soft loam as to make major repairs necessary. At the risk of being repetitious, we quote again from Collins' report of inspection as the machine had just got set to do its first work after returning from Arizona [R. 72]:

“There were 102 excavating chain links that were bent, drawn out of shape, or worn down to a point where they were dangerous to operate. * * * I have found that 82 tractor pads are all in very poor condition” [R. 75].

It may be argued that plaintiffs, by setting the machine to work upon its return from Arizona, thereby accepted it as in good condition. But the contrary of such acceptance is shown by their prompt notification to defendants of the damaged condition and by their demand upon defendants to make repairs [R. 35]. Plaintiffs had good reason to expect that defendants would make said repairs, inasmuch as they commissioned Collins to make an inspection and to report to them “what parts were necessary to put the machine in first-class operating condition” [R. 72]. Had plaintiffs refrained from using the machine, pending negotiations with defendants for its repair, they would have been obliged to rent another like machine at \$1500.00 per month and this cost they could very properly charge against defendants. But they acted with utmost good faith and out of consideration for defendants by thus minimizing the damages. They could

not stop work on their sewer contract with the City of Los Angeles. It is to be presumed that said contract had the usual provisions for penalties for failure to complete it within a specified time. Instead of being condemned by defendants for making emergency adjustments and putting the machine to work, they should be commended for their good faith and considerateness.

When it became evident that defendants would not make the repairs, plaintiffs ordered the necessary repair parts. The evidence is uncontradicted as to the cost of these and of the labor necessary to install them. The parts ordered and their respective costs and the labor costs are as follows:

82 multipedal bolts and slats	\$1199.33
2 idler shafts	30.90
150 excavator links	757.05
30 excavator links	147.00
Pioneer Blocksmith and Welding Co. (cutting bolts)	33.77
Labor	498.75
<hr/>	
Total.....	\$2666.80

All of the above, with the exception of the item "30 excavator links" were set forth in plaintiffs' bill of particulars [R. 17-19] and it was stipulated that the list thus set forth correctly reflected the cost of the labor and materials expended by plaintiffs in repairing the machine after its return to Los Angeles from Fort Huachuca [R. 23]. As we have previously stated, 180 and not 150 excavator chain links were actually installed.

There is some discrepancy, though not contradiction,

in the testimony as to the number of links necessary to repair the excavator chain. Collins reported to defendants that 102 new links were necessary, and that there were 150 links in the chain [R. 75]. However, it is clear from the evidence that Collins was in error as to the number of links in the chain. His mistake can be accounted for by the fact that when he made the inspection the boom of the machine was down in a 9 foot trench, so that at least 18 feet of the revolving endless excavator chain was covered with dirt [R. 129]. Brownfield [R. 97], Culjak [R. 37] and Devine [R. 52] all testified there were 180 links.

When Collins was asked why he had sold plaintiffs 150 links after having stated that only 102 were necessary for repair of the chain, he said: "I am always anxious to see a machine operating successfully, and I know that it would not give the best results where you get some poor links and a lot of new ones, and the labor of making that change very often will save the amount of links that you would put in. I would say it would be very nearly as costly for the plaintiffs to have installed 102 links as to install a complete chain of 150 links" [R. 83]. Devine testified substantially to the same effect. He said that where you pick out a good link here and there from a chain of damaged links you would have to take out the bushings and get new pins. In doing that, the question of labor involved would be an even break [R. 57] since the new links come in 20 foot sections [R. 58]. Devine was of the opinion that Collins could not thoroughly inspect the machine by a casual inspection of one hour. He said you have to tap the chain with a hammer as he did, because a lot of them would look good but you would have to tap them to see whether they were fractured or

not. Devine, after a thorough inspection found only 9 or 10 good links in the old chain [R. 52]. Brownfield was of the opinion that 25 per cent of the links were in bad shape when the machine was returned to plaintiffs [R. 108]. These were bowed or bent so as to be readily noticeable. However, even a trained operator, he said, couldn't detect with the naked eye particular links, unless he watched them go over the sprocket or put a square on the link, or a rule or calipers [R. 110].

There can be no doubt whatever that repairs were necessary. All the competent witnesses admitted that the 82 multipedal pads should be replaced. Brownfield said 25% of the chain links should be replaced, but it was apparent that his estimate was based upon an inspection with the naked eye which he admitted was insufficient. Collins did not see the entire chain when he said 102 links would be sufficient to install. Only Devine made a complete and thorough examination and he found that only 9 or 10 good links were in the old chain and that the labor cost of taking these out of the old chain, removing the bushings and putting in new pins would be "an even break" with the cost of installing 9 or 10 new links. This appears to be sound reasoning. The evidence was undisputed as to the 2 idler rolls and as to the labor costs.

We think the evidence taken as a whole warrants only one reasonable conclusion, namely, that all of the parts we have listed as having been installed and all of the labor expense were necessary to restore the machine to as good condition as when leased to the defendants, ordinary wear and tear excepted.

But defendants contended there was no need for so many links being installed. They offered in evidence a

list of parts installed by them during the period of lease. Among these was a total of 123 excavator chain links [R. 24-26]. Ordinarily that would be a surprisingly large number for only approximately 128 days' operation of the machine, in view of the fact that during 10 or 11 months', or approximately 330 days', operation by plaintiffs from 1930 to 1940 not even one excavator link was installed; but we are not so surprised when we recall that the machine was operated during those 128 days in extremely rocky ground and, most of that time, on a night shift also. We are less surprised when we recall the testimony of Browning who operated the machine for defendants that, because of the rocks getting into the chain line, they had to replace as many as 4 or 5 or even 6 links a day [R. 97, 98]. These replacements were only when a link broke [R. 98]. Evidently, a bent link was not replaced. This testimony of Brownfield is corroborated by Cavanaugh who testified repairs were made almost daily [R. 119]. Brownfield's estimate does not include links broken and replaced in the night shift while the machine was in charge of another operator. It can thus be seen that the 123 links which defendants show they installed would not be sufficient to replace even at the rate of one a day, much less 4 or 5 or 6 a day. Our conclusion must be that, since it was only when the chain actually broke that a link was installed; bent, bowed, twisted and fractured links were allowed to remain in the machine when it was returned to plaintiffs. Culjak's description that when he first saw it on its return "all the chains were bent" seems to be an understatement. It is difficult to imagine even 9 or 10 links being serviceable under such conditions. When Brownfield testified that he installed "around 20 links" [R. 99], when the final repairs

were made at Fort Huachuca, he must have taken links which previously had been discarded.

Taking all the evidence we must be convinced, as we believe the Trial Court was at the conclusion of the evidence when he ordered written memoranda *only* upon plaintiffs' right to rent for the machine while being repaired, that the repairs made by plaintiffs were necessary.

POINT IV.

Seventh, Eighth and Tenth Assignments of Error.

What Was the Obligation of Defendants With Reference to Repairs of the Machine?

Conclusion of law 2 states that plaintiffs are not entitled to the damages prayed for in their complaint. The other assignments relate to errors of law in denying judgment for plaintiffs and in giving judgment for defendants.

It is to be assumed from this that the Court below must have found that the machine was not in need of repairs upon its return or, if it was, that defendants were not obligated to repair it.

The evidence shows that before any written contract was executed the machine was delivered to defendants upon assurance given to plaintiff Culjak that the machine was not to be operated on rocky ground [R. 29]. The leasing of the machine constituted a bailment for hire. The principles controlling a bailment for the mutual benefit of the bailor and the bailee were, therefore, applicable. Under such a bailment the bailee was required to exercise ordinary care and diligence with reference to the bailed article. *Mulvaney v. King Paint Co.*, 256 Fed.

612; *Crescent Bed Co. v. Jonas*, 206 Cal. 94, 273 Pac. 28; *Kittay v. Cordasco* (N. J.), 134 A. 667; *Moon v. First National Bank* (Pa.), 135 A. 114; *Western Machinery Exchange v. Northern Pac. Ry. Co.*, 142 Wash. 675, 254 Pac. 248. The degree of care to be exercised by the bailee in such case is the care which an ordinarily prudent person would bestow on his own property of a like description. *Webber v. Bank of Tracey*, 66 Cal. App. 29, 225 Pac. 41; *Fidelity Storage Co. v. Foster* (D. C.), 51 F. (2d) 439. As stated in a well-known text: "In general the bailee must always use well the property entrusted to him and he is also bound to exercise good faith in every matter in which the interests of the bailor may be affected. In accordance with this general principle, a bailee who has damaged the corpus of the bailment by disregarding the instructions of the bailor as to the use of the property must respond in damages." 8 C. J. S. 264, *Bailments*, Sec. 26, citing *Zell v. Dunkee* (Ky.), 75 S. W. (2d) 761; *Whitehead v. Johnson*, 268 N. Y. S. 368.

In bailments for the mutual benefit of bailor and bailee the bailee is responsible for repairs which are ordinary and incidental to the use. 8 C. J. S. 257, Sec. 24; *Schmidt-Hitchcock Contractors v. Dunning*, 38 Ariz. 360, 300 Pac. 183; *Harlan v. Paxton* (Ark.), 3 S. W. (2d) 1004; *Woodward v. Royal Carpet Cleaning Co.* (La. App.), 134 So. 443.

CONSTRUCTION OF THE CONTRACT.

The written contract was prepared by defendants. Any ambiguity in its language must be construed most strongly against them. 13 C. J. 544. The contract provided that after the receipt of the machine in a condition to render

efficient, economic and continuous service, the lessee was to make all necessary minor or field repairs thereon. This provision was but a paraphrase of the general rule requiring a bailee to make all ordinary or incidental repairs and to return the bailed article in the same condition as when received, ordinary wear and tear excepted. Field repairs must be understood to mean those repairs which would be incidental, or arise out of, or be caused by the particular field operations; in other words, those repairs which would be necessitated by reason of the particular use to which the machine was put in the field.

The contract stated, however, that repairs which were neither minor nor field were to be made by plaintiffs.

MINOR REPAIRS.

Illustrations of minor repairs would be repairing and replacing minor parts such as bolts, nuts, pins, chain links, track pads, etc. Although such repairs might be "minor", they might also be "field" repairs, since they might be incidental to the operations.

Field repairs would include repairs which might be minor as well as those which might not be minor, provided they arose out of or were incidental to the field operations. Replacement of damaged links or damaged track pads injured in the field operations would undoubtedly be classed as field repairs, even though they might also be classed as minor repairs. The repair of the main shaft of the machine, because of excessive strain in the field operations, or because of the negligent use of the machine by the lessees, or because of some accident in the field operations, would unquestionably be a field repair, though not minor. The contract did not require plaintiffs

to make such class of repair. To so construe the contract would be tantamount to relieving defendants from all liability for their own negligent or reckless use of the machine. A provision of such a nature in a contract would be contrary to public policy and void. 8 C. J. S. 264, 265, 273.

It is, therefore, illogical to say that merely because a repair was major it was plaintiffs' duty to have it made, regardless of how such repair was necessitated; and it is equally illogical to assert that "other than minor or field repairs" means *all major repairs*. What the contract intended was that all repairs which could not be classed as ordinary or incidental, that is, minor or field, should be made by plaintiffs.

OTHER THAN MINOR OR FIELD REPAIRS.

Suppose a main part of the machine, such as the boom or a vital shaft, had some latent defect or had become crystallized, and suppose such boom or shaft should break, through no fault of the lessees and while the machine was operating in ground to which it was adapted, undoubtedly, it would be the duty of the lessors to stand the expense of repairing or replacing such broken part, since that would be other than minor or field repairs.

MEANING OF TERMS IN THE TRADE.

The foregoing was the meaning of the terms as understood in the contracting business where trenching machines are operated, as testified by the witnesses for both parties and among whom there was no contradiction on the matter. According to said witnesses the provision in the contract requiring the defendants to make all necessary minor or

field repairs meant that they were to keep the machine repaired and return it to plaintiffs in as good condition as when received, ordinary wear and tear excepted.

Culjak, who had been in the contracting business more than ten years and who had owned trenching machines all that time, testified:

“As to the meaning of the words ‘necessary minor repairs,’ we consider in the contracting business anything that is damaged on a construction work should be replaced at the time it is damaged, and not wait until everything is gone; and as to ‘field’ repair that anything damaged in the field should be repaired right there and not wait until everything is gone. If a pad is damaged and bent and indented and spread out, the operator should stop right then and put in a new slat right there” [R. 123-124].

Devine, who had worked with practically all trenching machines since 1912 [R. 47], testified:

“Minor repairs and field repairs are practically the same thing. A minor repair could be a bolt came loose. The key could get loose and the gear would shift a couple of inches. You have to stop to fix such things. A field repair would be anything that should be replaced. If a major part of the machine, like a shaft, was broken in the operation, that would be a field repair. I would say a field repair is any breakage or condition resulting from operation. I would say those injured or damaged pads were field repairs” [R. 128-129].

Lest it be said that the foregoing is the testimony of interested witnesses for plaintiffs only and, therefore, unconvincing, we now present the testimony of the defend-

ants' superintendent, Dan Cavanaugh, who had twenty years' experience in contracting business and who was familiar with trenching machines [R. 119]. He was asked by defendants' counsel: "Q. And what is meant in the trade by the phrase 'necessary minor or field repair'?" He answered: "A. Minor repairs, as I understand it, are repairs to keep the machine running." This answer, upon objection was stricken. Counsel for the defendants then asked: "Q. As generally used in the trade, what does that expression mean?" The witness answered: "A. It means to keep the machinery, the equipment running. The repairs necessary or required to keep the equipment running on the job. Major repairs are considered such as overhaul repair, or some heavy shaft, tracks, or something like that, or it has to go into a shop or something outside of the field shop" [R. 119-120]. On cross-examination this witness was asked: "Q. Now, Mr. Cavanaugh, is it not a fact that you considered those two terms in the contract as requiring you people to do the minor or field repairs and put you under the obligation to put the machine back into the condition it was when you got it, ordinary wear and tear excepted?" And his answer was: "A. Yes, sir. That is what I considered those terms to mean in effect."

"MINOR" VERSUS "MAJOR."

Apparently, the Court below was impressed by the expensiveness of the repairs made by plaintiffs after the machine was returned. Apparently, he thought the repairs made were "major" as finding of fact 9 declares. The repairs made by plaintiffs were but an accumulation of minor repairs which should have been made as the in-

juries occurred. If the defendants had fulfilled their duty under the contract and had replaced each bent or bowed or elongated link in the excavation chain as soon as it got in such condition, there would not have been 102 links in the chain "bent, drawn out of shape, or worn down to a point where they were dangerous to operate," as Mr. Collins reported to defendants [R. 75]. The cost of each of those links was only \$4.90 [R. 78], a minor cost. The cost of 102 links was \$499.80, a major cost. But that major cost was but the aggregate of 102 minor costs. If the contract required defendants to make all minor repairs, can they evade their liability by allowing the minor repairs to aggregate until they have multiplied more than a hundred fold?

If the defendants had fulfilled their duty under the contract and had replaced each damaged track pad as soon as it got in that condition, there would not have been "82 tractor pads all in very poor condition" as Collins reported [R. 75]. A single track pad would have cost only \$14.20, a minor cost. The cost of replacing 82 track pads, exclusive of the cost of labor, was \$1199.33, a major cost. Had each damaged track pad been replaced as soon as it became damaged, the individual repair would have been minor; but because the defendants recklessly drove the forty-ton machine over rocky terrain and over ground in which there were jutting rocks which broke and crushed the wooden fillers of the caterpillar pads, and indented and spread out of shape the steel casings of those wooden pads [R. 76, 105, 118, 121] and made no replacements of the damaged pads, there was a multiplication of the damaged units, the repair of the aggregate of which was a major repair.

The highest cost of any single part purchased by plaintiffs to make repairs on the machine after its return to them was for those tractor pads at \$14.20 each [R. 68]. The total cost of all parts purchased for said repairs was \$2134.28.

During the five months' period of operations, the defendants purchased for repair of the machine 1 single part costing \$60.00; 1 costing \$54.60; 1 costing \$54.50; 1 costing \$49.50; 1 costing \$48.50; 1 costing \$39.90; 1 costing \$27.60; 3 costing \$27.50 each; 1 costing \$22.50; 3 costing \$22.30 each, 2 costing \$15.60 each; and 1 costing \$15.40 [R. 24-26].

The aggregate cost, including labor, of the minor or field repairs shown to have been made by defendants was \$4211.13. Contrast this with the total of \$2666.80, which included labor, expended by plaintiffs for repair of the machine after its return. How can it be said that repairs costing \$4211.13 are not major, while repairs costing the lesser amount of \$2666.80 are major?

The list of repairs made by defendants [R. 24-26] indicates that they understood the contract as obligating them to replace at their own cost some of the identical parts which plaintiffs replaced after the machine was returned. Since said list also shows much costlier parts than the tractor pads as having been replaced by defendants, how can it be reasoned that the defendants felt themselves obliged to replace such costlier parts but not the tractor pads?

RENTAL OF MACHINE DURING REPAIRS.

The plaintiffs claim as damages rental for the machine during the time it was being repaired by them after its return. It is the settled rule in cases of this kind that the measure of a plaintiff's damages is the amount which will compensate him for all loss proximately caused by a defendant's default. 8 C. J. S. 364; 25 C. J. S. 598, 599. Thus, in *Southern Iron & Equipment Co. v. Smith* (Mo.), 192 S. W. 754, the court held that if the repairs were incidental to the use of the machine, the time lost in making the repairs was defendant's loss and not plaintiff's.

Here, again, the plaintiffs have been modest in their claim. It took 30 days before the parts ordered for the repairs could be delivered [R. 95] and it would have taken that long, any time between the middle of May and prior to July, 1941 [R. 96]. In reality, therefore, the machine was held up for 60 days, because it took 30 days to make the repairs after the parts were delivered [R. 38] and this was less than as estimated by Collins who said it would take 40 days [R. 95]. The plaintiffs, however, claim only for 30 days the rental of \$1500.00, which was the rental provided in their contract with defendants, and which was less than the reasonable prevailing rental [R. 60, 91].

The evidence is uncontradicted that, if the machine were available during the thirty days it was being repaired, the plaintiffs could have rented it for not less than \$1500.00 per month [R. 39-40, 60, 63].

Under the law and the undisputed facts, therefore, the plaintiffs were entitled to this item of damages in the amount of \$1500.00, which, added to the damages expended for repairs, gives a total of \$4166.80 for which plaintiffs should have been awarded judgment.

POINT V.

Ninth and Eleventh Assignments of Error.

Was There Abuse of Discretion by the Trial Court in Refusing to Allow a Trial Amendment of the Complaint and in Denying Plaintiffs' Motion for a New Trial?

TRIAL AMENDMENT OF PLEADINGS.

During the course of the trial counsel for defendants objected to certain testimony as to damages which were not specified in the bill of particulars. Thereupon, counsel for plaintiffs requested leave to amend the complaint to permit such proof. The Court granted the request on condition that a continuance would be granted to the defendants. Counsel for defendants refused to accept such condition. Thereupon, the Court sustained the objection to the testimony and counsel for defendants made an offer of proof that when the machine was returned to plaintiffs it was damaged in several particulars not specified in the bill of particulars to the extent of 10% or 11% of the value of the machine [R. 54-55].

It is respectfully submitted that the testimony offered of the additional damages was of the same general character as that offered with respect to the specific matters set forth in the bill of particulars. Defendants had already been apprised of such damages by the testimony of their own witnesses whose depositions were taken long before the date of the trial, particularly with reference to the damaged buckets [R. 110].

The Court imposed an unreasonable condition upon plaintiffs who were residents of Los Angeles County, California, who must have been put to much inconvenience,

loss of time and expense, at a time when government regulations made travel difficult, to attend the trial at Tucson, Arizona, and who probably felt that the amount involved in the claim for additional damages would not justify a duplication of such inconvenience, loss of time and expense.

Another trial amendment requested by counsel for plaintiffs was in relation to 30 additional excavator chain links which were installed in the machine upon its repair but which were not particularized in the bill of particulars. No objection was made to the testimony offered as to these additional links. An amendment was requested, but no order appears in the record of the granting of such request, although the trial proceeded as if the amendment had been allowed [R. 37]. [See Rep. Tr. p. 53.] The evidence was conclusive that a total of 180 links were installed.

Because of the inadvertence of not including the 30 additional links in the bill of particulars, the amount prayed for in the complaint was substantially less than the amount of damages conclusively proved. When the bill of particulars was filed, it became a part of the pleading which it supplements (Rule 12(c)).

Under the old rule, the law is, as stated in 49 *C. J.* 173:

“However, under modern codes, practice acts, and other statutes regulating practice, where the rule is that the facts set forth, rather than the relief demanded, determine the relief which shall be granted, the prayer is unimportant, at least where an answer is filed, unless there is some ambiguity in the statement of facts, so that if plaintiff is entitled to some relief under the facts which he has set forth he will

be granted such relief, although he has prayed for relief to which he is not entitled, for more or less relief than he is entitled to, or for no relief whatever."

And the new rules, 54(c), provide:

"Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Speaking of this rule, it has been said:

"If the appellant has stated a cause of action for any relief, it is immaterial what he designated it or what he has asked in his prayer; the court will grant him the relief to which he is entitled under the facts pleaded. Rule 54(c), Fed. R.P. See also *Atwater v. North American Case Corp.*, 36 Fed. Sup. 975, 977, (2 Fed. Rules Service, 89.25, Case 2.)"

Kansas City ,etc. v. Alton R. Co. (C. C. A. 7), 124 F. (2d) 780.

"The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." (Rule 61.)

We think the Court should have allowed the amendment without imposition of the harsh condition; but whatever may be said in defense of the Court's order in that respect, cannot apply to the item of 30 additional excavator chain links, testimony as to the installation of which was received without objection.

Conclusion.

We have shown by the foregoing discussion that the plaintiffs leased to defendants a trenching machine upon the representation of defendants that it was not to be used in rocky or stony ground.

We have shown that when the machine was delivered to defendants, it was in first-class condition throughout.

We have shown that it was the duty of defendants to maintain it in that condition by making thereon all necessary minor or field repairs and to return it to plaintiffs in that condition, ordinary wear and tear excepted.

We have shown that defendants used the machine on extremely rocky ground to which it was not adapted, that they ran it over ground with jutting rocks which greatly damaged its caterpillar track pads, and that they operated it to excavate rocks which damaged and destroyed its entire 180 excavator chain links.

We have shown that, while defendants expended a substantial sum in making minor or field repairs during the period said machine was in use by them, when they returned it to plaintiffs it was in a greatly damaged condition, and not in the first-class condition in which it was received, ordinary wear and tear excepted, and that all necessary minor or field repairs had not been made thereon.

We have shown that plaintiffs after the return of said machine endeavored to have defendants make such minor or field repairs on the machine as were necessary and as would restore it to efficient, economic and continuous working condition, but that defendants refused to do so.

We have shown that plaintiffs expended the sum of \$2666.80 upon necessary minor or field repairs which defendants should have made on said machine, and that said sum was the reasonable cost of said repairs.

We have shown that while said machine was being repaired, plaintiffs could have rented it at \$1500.00 per month and that such rental was the reasonable market rental of said machine at that time.

We have shown that the Court below erred in failing to award judgment to plaintiffs for \$4166.80 or for any sum.

We have shown that all the competent and material evidence before the Court supported the claim of plaintiffs and that said evidence was undisputed.

We, therefore, respectfully ask that the judgment of the Court below be reversed and that plaintiffs be awarded judgment by this Court for \$4166.00.

Respectfully submitted,

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Los Angeles, California;

CONNER & JONES,

By GERALD JONES,

Tucson, Arizona,

Attorneys for Appellants.

Dated: July 13, 1944.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

MARTIN CULJAK and JOSEPH ZELKO, co-
partners in business under the firm name and
style of CULJAK & ZELKO, Appellants,

vs.

DEL E. WEBB, doing business under the name and
style of DEL E. WEBB CONSTRUCTION CO.,
and WHITE & MILLER, CONTRACTORS,
INC., a corporation, Appellees.

UPON APPEAL FROM THE DISTRICT
COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA

Brief of Appellees

FILED

AUG 14 1944

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No. 10748

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

MARTIN CULJAK and JOSEPH ZELKO, co-
partners in business under the firm name and
style of CULJAK & ZELKO, Appellants,

vs.

DEL E. WEBB, doing business under the name and
style of DEL E. WEBB CONSTRUCTION CO.,
and WHITE & MILLER, CONTRACTORS,
INC., a corporation, Appellees.

BRIEF OF APPELLEES

DEFENDANTS' STATEMENT OF THE CASE

Plaintiffs' statement of the case is based largely upon the testimony of plaintiffs' witnesses. The testimony of other witnesses contradicting plaintiffs' testimony has been disregarded. This is true, also, throughout the argument in plaintiffs' brief wherever a discussion of the evidence appears.

The trial court found facts in favor of the defendants. If there is any substantial evidence to support its findings, then this court should disregard plaintiffs' testimony to the contrary. We will endeavor

to make a statement of the case based upon the entire evidence.

This case is based upon a violation of an equipment rental agreement between plaintiffs and defendants, whereby plaintiffs rented to defendants a certain trenching machine (R.5). This agreement recites that the machine was rented to the defendants to construct for the Government a complete cantonment group at or near Fort Huachuca (R.6). No mention is made in the agreement of the nature of the soil at Fort Huachuca.

It is provided in the agreement that all necessary minor or field repairs upon said trenching machine shall be made by the lessee without cost to the lessor. Other than minor or field repairs shall be made by the lessor without cost to the Lessee (R.7).

The complaint for the recovery of damages for the violation of this agreement alleges that defendants failed, during said rental period, to make necessary minor and field repairs upon said trenching machine, and that by reason of defendants' failure in this respect and as a direct and proximate result thereof, the said trenching machine, when returned to plaintiffs on or about April 7, 1941, was in a damaged, deteriorated and unfit condition and was not in a condition to render efficient, economic and continuous service, and was not in the condition in which it was received by defendants from plaintiffs, reasonable and ordinary wear and tear excepted.

The plaintiffs further alleged that for the purpose of having said trenching machine restored to the same reasonable condition as when delivered by plaintiffs to defendants, as aforesaid, plaintiffs

were obliged to expend and did expend and pay the sum of Two Thousand One Hundred and 38/100 Dollars (\$2,100.38) for reasonable repairs to said trenching machine, which repairs were made necessary by defendants' failure to have necessary and minor field repairs made to said trenching machine as from time to time needed, and that by reason of defendants' failure to make said repairs, and as a direct and proximate result of such failure, while in use by said defendants under said rental agreement, plaintiffs have been damaged in said sum of Two Thousand One Hundred and 38/100 Dollars (\$2,100.38) (R. 3-4).

The plaintiffs further alleged that they were deprived of the use of said machine for a period of thirty days necessarily consumed in making said reasonable repairs; that the reasonable monthly rental value of said trenching machine is Fifteen Hundred Dollars (\$1500.00), and that plaintiffs were further damaged by reason of defendants failure to make said repairs in the sum of Fifteen Hundred Dollars (\$1500.00). Plaintiffs prayed judgment for Three Thousand Six Hundred and 38/100 (3,600.38) Dollars and costs (R. 3-5).

Later on plaintiffs filed a Bill of Particulars showing the damages on the machine to be: cost of parts used in repairing, \$2,021.05; the cost of labor employed in making the repairs, \$498.75, making a total of \$2,519.80. (R. 17, 18, 19).

The defendants in their answer admit the allegations of the complaint as to the lease and the good condition of the machine when leased, but deny each and every other allegation contained therein (R. 22).

This trenching machine, at the time of the lease, was twenty years old (R. 92). The cost of this trenching machine new, with the attachments, is in the neighborhood of \$16,000 or \$17,000 (R. 91). Plaintiffs purchased the machine in 1930 (R. 40).

The trenching machine was shipped from Los Angeles to Fort Huachuca, Arizona, about December 1st, 1940, where it was operated by defendants and returned to Los Angeles about April 16th or 17th, 1941, and the total amount received by plaintiffs for the use of the machine during that time was \$8,225.00 (R. 43).

That while the trenching machine was being operated at Fort Huachuca, the defendants expended the sum of \$4,211.13 in making the necessary minor or field repairs (R. 24-27).

When the trenching machine was returned to the plaintiffs at Los Angeles it was in as good condition as when it was delivered, except for the pads on the caterpillar treads and except for the fact that there were welded buckets instead of new buckets (R. 103).

In presenting their case in chief, the plaintiffs introduced three witnesses, Martin Culjak, one of the plaintiffs, and Pat Devine, one of the owners of the machine, and their attorney, Frank J. Barry.

Martin Culjak testified that he did not remember making any repairs on the machine from the time it was returned from Fort Huachuca until they started to overhaul it during the last part of August, 1941 (R. 42).

Devine testified that from the time the machine returned from Fort Huachuca until August 28th,

1941, he made minor repairs. He repaired the conveyor chains; he took out twisted links and put in new ones; he repaired maybe 25 links. "We had those links in the warehouse. I put them in at Longridge on the first trip there. They are different links. I did not put in any chain links such as referred to here. I put none of such links in at Magnolia or Longridge." (R. 62, 63).

On the 28th day of April, 1941, a few days after it was returned to plaintiffs at Los Angeles from Fort Huachuca, the trenching machine was put to work by the plaintiffs on the Longridge sewer job near Los Angeles in place of a smaller machine which could not do the work. It was there worked continuously on that job until May 7th, 1941, when it was moved over to the Magnolia Blvd. job, a distance of about sixteen miles, and used there until June 11th, 1941, when it was moved back on the Longridge Avenue job and again put to work on that job and kept there until that job was finished on July 22, 1941 (R. 113).

While on the Longridge job and the Magnolia Blvd. job, according to Leslie H. Snelling the City Inspector for Los Angeles on those jobs, this machine seemed to be in a reasonably good state of repair and in a condition where it would do the work it was supposed to do (R. 116).

Mr. Collins testified, after describing the new tractor pads and the new links, "all those parts—but the biggest cost of the repairing is what we call a major repair, and this is a major repair," and that by the word "major" he meant that it is the most costly part of the machine (R. 80).

Pat Devine, explaining what a hard job it was to replace the pads, testified: "The work done by Aran-bel was necessary and so was the work done by all of us. It is a hard job to take those tracks off and put them in. We would have to have more men than that if I did not have the crane there." (R. 58).

The plaintiff ordered the repairs on July 26, 1941.

The work to repair the machine began on August 28, 1941, and was completed on September 17, 1941, covering a period of twenty-one days (R. 18, 19).

ARGUMENT

FIRST ASSIGNMENT OF ERROR. MACHINE WHEN LEASED TO DEFENDANTS.

We shall now consider appellants' argument beginning on page 15 of their Brief.

This Finding of Fact 3, that the machine was purchased in 1930, and had never been repaired, which plaintiffs make their first assignment of error, is an understatement of what the evidence fully revealed, to-wit: "A trenching machine isn't run every day of the year, and we figure a 20 year life. It is not 20 years of actual operation, but 20 years from the time it was bought until the termination of that particular time. The average machine runs about 10 years in 20, but we take it, if a man wants to buy a piece of equipment, the first thing he asks is, "When was that bought?" When I say that this was bought in 1920, that makes it 20 years old." (R. 92). (Appellants' Brief 13, 14 and 15.)

It is to be expected that the age of a piece of machinery is to be considered in estimating its workable condition, and the fact that it had not been repaired any for ten years also indicates that it would be in need of other than necessary minor or field repairs.

SECOND, THIRD AND SIXTH ASSIGNMENTS OF ERROR

Plaintiffs contend that Finding of Fact 7: stating that the defendants expended \$8,250.00 in rentals and \$4,211.13 for labor, was wholly immaterial (Appellants' Brief 15-21). In that case the finding was harmless and not prejudicial. However, the fact that \$8,250.00 was paid plaintiff for the use of the machine for four months seventeen days shows a handsome dividend upon a \$16,000 to \$20,000 investment, (R. 14, 91), and reflects why other than necessary minor or field repairs were to be made by plaintiffs. Then, again, the fact that the defendants expended \$4,211.13 in repairs indicates that they were making the necessary minor or field repairs, as required by the equipment agreement, even though they did not furnish a new set of tractor pads which Collins described as "major repairs" (R. 80).

Collins testified that the defendants bought enough parts to put the machine in as good a shape when it left Fort Huachuca as when it left Los Angeles (R. 86).

In support of the Sixth Assignment of Error, the plaintiffs on pages 16 and 21 of their Brief undertake to show that the Court erred in making the Conclusion of Law 1 "that the defendants, in accordance with the terms of the agreement, made all

the necessary minor or field repairs before delivering said machine to plaintiffs." They review much of the evidence introduced at the trial to show that when the machine was returned to plaintiffs it was in a damaged, deteriorated and unfit condition and was not in the condition in which it was received by the defendants, ordinary wear and tear excepted. The plaintiffs don't seem to realize that the equipment agreement (R. 7) provided for the manner in which repairs are to be made, and it did not provide that the machine should be returned in the same condition as it was when received, ordinary wear and tear excepted. The evidence shows that the defendants overhauled the machine at Fort Huachuca before it was returned to Los Angeles and that, with the exception of the pads on the caterpillar treads and that there were welded buckets instead of new buckets, the machine was in as good condition as when delivered (R. 103). It also appears from the Record that immediately after the machine was returned to Los Angeles it was put to work by plaintiffs on the Longridge Street job and the Magnolia Blvd. job and there operated from April 28th to July 21st, 1941 (R. 113), and, according to a disinterested witness, it was in good enough condition to do the work on those jobs (R. 116).

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

In their fourth and fifth assignments of error (Appellants' Brief 23-30) plaintiffs contend the fact that the machine was put to work at Van Nuys, California, (Longridge sewer and Magnolia Blvd.) is immaterial or that no repairs were necessary. If this

Finding of Fact was immaterial, it was not prejudicial and therefore not grounds for appeal.

We do contend, however, that when put to work on the Longridge sewer and Magnolia Blvd. jobs the machine was not in need of any necessary minor or field repairs mentioned in the equipment agreement. The evidence shows that when the machine was returned to Los Angeles it was put to work almost immediately on the Longridge sewer and Magnolia Blvd. jobs without any repairs to the parts listed in the Bill of Particulars (R. 17); that all the necessary minor or field repairs were performed before the machine left Fort Huachuca; that no repairs were made on the machine from the time it was returned until August, 1941, when it was overhauled in plaintiffs' yards in Los Angeles.

Let us here review the testimony of the witnesses: Brownfield testified "when I finished this repair work at Fort Huachuca, except for the pads on the Caterpillar treads and except for the fact that the buckets were welded buckets instead of new buckets the machine was in as good a condition as when it had been delivered." (R. 103).

Plaintiff Culjak testified "I do not remember making any repairs on the machine from the time it was returned from Fort Huachuca till we started to overhaul it in 1941 the last part of August." (R. 42).

Devine testified "From the time the machine returned from Fort Huachuca until August 28, 1941, I made minor repairs. I repaired the conveyor chains. I took out twisted links and put in new ones. I replaced maybe 25 links. We had those links in the warehouse. I put them in at Long Ridge on the first

trip there. They are different links. I did not put in any chain links such as you are referring to here. I put none of such links in at Magnolia or Long Ridge." (R. 62).

It must be noted that Devine refers to conveyor chain links and not to excavator chain links mentioned in the Bill of Particulars (R. 17).

Snelling, the City Engineer, testified: "So far as I could tell from watching the machine operate, it seemed to be in a reasonably good state of repair and in a condition where it would do the work it was supposed to do. I did not see anything that would indicate that the machine had been misused in Arizona. In any event, it was in good enough condition that it did the work when brought over there, without any major difficulty and no breakdowns of any consequence." (R. 114).

Collins testified: "Confining ourselves to the tracks and the chains, I would say that the deterioration or damage was in excess of ordinary wear and tear, but the work that they did on it over there to put it in shape overcame the difference between ordinary wear and tear and excessive wear and tear. That is the part outside of the Cats and others. In other words, they *brought* enough parts to put that machine in as good shape when it left over there as it was when it left here. It is my opinion, that it was in as good condition as it was when I inspected it about 30 days prior to leaving for Arizona with the exception of the cats and the chains, the cat being the pad and the chain." (R. 86).

Now when we consider all the evidence we must conclude that all necessary minor repairs were made

on the machine before it was returned to the plaintiffs. The agreement provides not that all minor repairs be made by defendants, but only *necessary* minor or field repairs. The use of the disjunctive indicates the parties considered field repairs and necessary minor repairs the same thing.

It seems quite probable that the machine was in need of other than necessary minor or field repairs which may be called major repairs, as distinguished from minor. Those were made at plaintiffs' yards in Los Angeles after the completion of the Van Nuys or the Longridge and Magnolia Blvd. jobs. Those repairs were made between August 28th and September 17th (R. 17-19).

The tractor pads, or multipedal slats, as they are sometimes called, were classified by Collins as a major repair job. Collins also testified that he did not think that the excavator chains would have anything to do with running a true line (R. 89).

The testimony of Devine explaining what a hard job it was to replace these tractor, or multipedal pads or tracks shows that it was no necessary minor or field repair job. The excavator chain links may not have been in perfect condition, but it is quite evident from the performance of the machine at Longridge and Magnolia Blvd. that it was not necessary that they should be in order to operate the machine (R. 62).

The plaintiffs' claim for rental damages (Appellants' Brief 38), when we consider the use they made between April 28th and July 21, 1941, (R. 113) on the Longridge and Magnolia Blvd. jobs, should not

be taken seriously. The rule of law that should prevail in view of the facts in this case we hold is as follows:

Where through an injury to property plaintiff is temporarily deprived of its use, the measure of his damage is the amount of the injury to the property, together with the value of its use during the time required by the exercise of proper diligence to secure its repair.

17 C.J. 878, Sec. 184.

If the plaintiffs had been diligent they would have ordered the pads on April 28, 1941, when they claimed to have discovered their need, instead of waiting until July 28, 1941 (R. 96). It is the law that there can be no recovery for loss which may have been prevented by reasonable effort on the part of the person injured.

17 C.J. 767, Sec. 96.

The best answer to plaintiffs' argument for rental damages is that which plaintiffs themselves used in their Memorandum in the trial court where they argued, "If the plaintiffs, instead of using the machine themselves, had put it up for repairs at once when it was returned to California, they would have been compelled to rent another trenching machine, and would have been entitled to the rental value which they would have had to pay (25 C.J.S. 601). While the machine was actually used for a period of ten days, or eighty hours, it was on two jobs for a period of better than thirty days, and they would have been compelled to rent a machine for thirty days or longer."

SEVENTH, EIGHTH AND TENTH ASSIGNMENTS OF ERROR

In support of the Seventh, Eighth and Tenth Assignments of Error against the Court's Conclusions of Law 2, to-wit, that the plaintiffs are not entitled to the damages prayed for, the plaintiffs argue that the court below must have found that the machine was not in need of repairs upon its return, or, if it was, that defendants were not obligated to repair it. Appellants' Brief 30-38).

It is defendants' contention that when the machine was returned to Los Angeles it was not in need of any necessary minor or field repairs, and therefore, according to the agreement, the defendants were not obligated to repair it.

Plaintiffs refer to a conversation between Culjak and a man named Morrison in regard to the terrain at Fort Huachuca. Very likely, by this conversation plaintiffs undertake to infer negligence on the part of the defendants in operating the machine. However, if they intended to prove negligence, they should have alleged it in their complaint, which they have failed to do.

8 C.J.S. 336, Sec. 26(c), note 20.

45 C.J. 1072, Secs. 645-647.

This suit is not based on any conversation between plaintiff Culjak and somebody else about the terrain around Fort Huachuca, as plaintiffs intimate. It is based on that written agreement set forth in the complaint, which recites that the machine is to be used in the construction of a Government cantonment camp at or near Fort Huachuca, Arizona

(R. 6). Nothing is said in the agreement about the nature of the terrain, and nothing that confines the use of the machine to sand, loam, clay, gravel or rocky ground. Culjak, however, testified as follows: "I knew when I rented the machine that it was going to be used at Fort Huachuca. We do not say in the contract the kind of ground our equipment is to be used on, but we say our equipment is to come back just as it went. The contract says that the lessees should make all necessary minor or field repairs, but there is no such thing in the contract that we should make the major repairs. We are not to make any repairs on the project." (R. 125).

The extent to which property which is the subject of the bailment can be used by the bailee must be determined by the contract of bailment, and the property can be used only to the extent and within the limitations provided by, or consonant with, such contract.

8 C.J.S. page 264, Sec. 26 b.

The leasing of the machine constituted a bailment for hire. The law provides that rights and liabilities under express contracts are, of course, controlled by the terms of the contract.

8 C.J.S. 257, Sec. 24, note 37;
*Oklahoma Petroleum and Gasoline
 Company vs. Winship*, 200 Pac. 844;
*New York Central Trust Company vs.
 Wabash R. Co.*, 50 Fed. 857;
Kennedy vs. Gardetto, 27 N.E. 2d, 957-
 959.

The rights, duties, and liabilities of the bailor and the bailee must be determined from the terms of the contract between the parties,

whether express or implied. Where there is an express contract, the terms thereof control, since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose, increasing or diminishing their rights, and their express agreement will prevail against general principles of law applicable in the absence of such an agreement.

8 C.J.S. page 255, Sec. 22;
Coons vs. First National Bank, 218 N.
 Y.S. 189;
Bratt vs. Poole, 178 P. 638;
Geis vs. Mathes, 280 P. 759.

In presenting their case in chief, the plaintiffs, beginning on page 31 of their Brief, maintain that the agreement is ambiguous in its language, and they very arbitrarily argue that the words in the agreement requiring the defendants to make all necessary minor or field repairs is but another way of saying that the bailee should make all ordinary or incidental repairs and return the bailed machine in the same condition as when received, ordinary wear and tear excepted. This, indeed, is a very simple method of altering the terms of a contract so as to completely change the meaning thereof.

From the very beginning the plaintiffs have been obsessed with the idea that the agreement provided that this machine should be returned to the plaintiffs in the same condition in which it was received by the defendants, ordinary wear and tear excepted, and counsel, Mr. Barry, early in July, 1941, wrote to the defendants: "After a careful study of the entire situation I cannot see how the lessee can escape liability for making necessary field repairs on the ma-

chine and returning the machine in as good condition as when received, ordinary wear and tear excepted. I am unable to convince myself that the damage to the machine is the result of ordinary wear and tear.” (R. 65).

Then again, in their brief they frequently call attention to the fact that the machine was not returned in condition to render efficient, economic and continuous service, and that it was not returned in the condition in which it was received, ordinary wear and tear excepted. (Appellants’ Brief 16, 21, 32). Plaintiffs should bear in mind that this is their case and the burden of proof is on them to show that the defendants did not make all the necessary minor or field repairs. No doubt the court below was impressed by this failure on the part of plaintiffs.

At the time they finished presenting their case, a motion to dismiss would have been in order and should have been urged. The defendants alleged in their pleadings, tried this case and are basing their appeal upon the theory that the machine should have been returned to the plaintiffs in the same condition in which it was received by the defendants, ordinary wear and tear excepted.

In support of this theory, the plaintiffs called two witnesses, Martin Culjak, one of the plaintiffs, and Pat Devine, a part owner of the machine (R. 61). These witnesses, in their direct examination chief, confined their testimony to the description of the damages done to the machine, and not until recalled to the witness stand after the defendants had completed their evidence did plaintiffs undertake to explain the terms of the agreement in regards to the

repairs. Then Culjak testified as follows: "the contract says that the lessee should make all necessary minor or field repairs, but there is no such thing in the contract that we should make the major repairs. We are not to make any repairs on the project" (R. 125).

Pat Devine, when recalled, testified: "minor repairs and field repairs are practically the same thing. A minor repair could be a bolt came loose. The key could get loose and the gear would shift a couple of inches. You have to stop to fix such things. A field repair would be anything that should be replaced. If a major part of the machine, like a shaft, was broken in the operation, that would be a field repair. I would say a field repair is any breakage or condition resulting from operation." (R. 128, 129) According to the above interpretations, the defendants were to make all necessary minor or field repairs and all other than minor or field repairs.

Such interpretations would make the terms of the contract nugatory.

Contract of a bailment should not be interpreted so as to render it nugatory unless such construction is primarily required by its language.

Brooks v. Davis, 1 N.E. (2d) 17.

We believe that Dan Cavanaugh gave the only clear and reasonable description of the terms "necessary minor or field repairs" when he testified that it meant to keep the machinery running; the repairs necessary or required to keep the equipment running on the job.

He further testified that “major repairs are considered such as overhaul repair, or some heavy shaft, tracks, or something like that, or it has to go into a shop or someplace outside of the field shop. I think the term field repairs would be the same as minor repairs. It would mean the repairs or work necessary to be done on the machine in the field to keep it running. It was not necessary to put on new pads, repair the pads, to keep the machine running on our job.” (R. 120)

The only evidence on behalf of the plaintiffs in support of their theory of the case is that elicited from Cavanaugh on cross-examination when he agreed with counsel for plaintiffs that the terms “minor or field repairs” were the same as to put the machine back in the condition in which it was received, ordinary wear and tear excepted. This is very little consolation for their failure to prove their contention by their own evidence.

NINTH AND ELEVENTH ASSIGNMENTS OF ERROR

It is quite apparent that plaintiffs inadvertently used the words “defendants” instead of “plaintiffs” in the 7th and 9th lines on page 39 of their Brief.

We contend that if the Court had permitted the plaintiffs to amend their complaint in the manner they requested at the time of trial, without giving the defendants an opportunity to investigate, it would have extended the most liberal rules of pleading beyond the breaking point.

In paragraph VII of their complaint (R. 5), it is alleged “that plaintiffs were further damaged by

reason of defendants failure to make said repairs in the sum of Fifteen Hundred Dollars (\$1500.00).''

What could they mean by *said repairs* unless it was the repairs alleged in paragraph VI of said complaint. Besides, in their prayer, they omitted that extra \$1500.00 and asked for judgment in the sum of \$3600.38.

Then again in the Bill of Particulars they increased the damages alleged in said paragraph VI of said complaint from \$2100.38 to \$2519.80, but made no mention of any further damages. It does not seem reasonable that, in spite of all the authorities cited by plaintiffs, at the time of trial the plaintiffs should be permitted to amend their complaint so as to show other repairs than those enumerated in paragraph VI of the complaint and further expanded in the Bill of Particulars.

Now, in regard to the number of links in the excavator chain, Collins testified there were 150; others testified 180; and the Bill of Particulars specified 150. Had we known in time that the Bill of Particulars was not to be relied upon, we might have determined for certain the exact number of links. However, we are not much concerned about the number of links since it is our contention that the chain links were in good working order when the machine left Fort Huachuca (R. 106-107). The machine rendered efficient service at the Longridge and Magnolia Blvd. jobs (R. 112-117) without any new links being put in the excavator chain between the time the machine left Fort Huachuca in April and was repaired or overhauled at plaintiffs' yards in Los Angeles in August and September, 1941. It appears that the

trial court had good grounds to conclude that the way the machine served the plaintiffs after it left Fort Huachuca showed that it was not in need of any necessary minor or field repairs and that the excavator chain links were in satisfactory condition.

Notwithstanding the liberality of the new rules of Federal Procedure, we still believe that the defendants have a right to know what they are charged with before they go into court and they should have some assurance that the complaint and the Bill of Particulars should fairly state the right of action. We believe that if a radical change is made by amending the complaint at the trial, the defendants should be given a reasonable time to prepare the additional defense required. Such is all that was asked for by the defendants in this case, and the court indicated its willingness to grant. We believe that, according to the record in this case, under Rule 54(c), Federal Procedure, the relief to which the plaintiff is entitled depends upon the facts pleaded and not upon theories.

Atwater v. North American Coal Corp.,
36 Fed. Supp. 975.

CONCLUSION

We are firmly convinced that the plaintiffs failed utterly to prove that the defendants did not perform their contract in full compliance with the terms thereof, and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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JOHN P. DOUGHERTY,
Assistant U. S. Attorney.

Attorneys for Appellees.

No. 10748

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARTIN CULJAK and JOSEPH ZELKO, co-partners in business under the firm name and style of CULJAK & ZELKO,

Appellants,

vs.

DEL E. WEBB, doing business under the name and style of DEL E. WEBB CONSTRUCTION CO., and WHITE & MILLER, CONTRACTORS, INC., a corporation,

Appellees.

REPLY BRIEF OF APPELLANTS.

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FILED

AUG 21 1944

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Appellees.

REPLY BRIEF OF APPELLANTS.

Correction of Appellants' Opening Brief.

Under Point V of appellants' brief at page 39 on the seventh line of the first paragraph after the sub-headings, the statement appears, "Counsel for defendants refused to accept such condition." We respectfully request that this be corrected to read "Counsel for plaintiffs refused to accept such condition."

The error was discovered by us after the copy was in the hands of the printer. We thank counsel for defendants for also pointing out the error.

We deem it proper, in view of certain misstatements and misleading arguments in appellees' brief, briefly to reply thereto.

Interpretation of Contract.

Defendants, throughout, base their argument upon the false premise that the sentence in Article II of the contract of lease: "Other than minor or field repairs shall be made by the Lessor without cost to the Lessee" [R. 7], is the equivalent of saying that all *major* repairs shall be made by the lessor without cost to the lessee. We have heretofore in our opening brief (pp. 31-33) analyzed the language of said Article II. It can easily be seen that a field repair, that is a repair necessitated because of use of the machine in the operations in the field, such as, for example, the breaking of a main shaft, because of undue strain or other cause, might well be a major repair. We have, however, no instance of such major repair involved in this case. Another error in defendants' argument is the assumption that an accumulation of minor repairs, because of their aggregate high cost, constitutes a major repair, although such repairs, thus accumulated, would be minor repairs, if singly done. Defendants rely on their witness Collins (Appellees' Br. p. 11) to support this argument, although it clearly appears from Collins' testimony that what he meant was that the making of accumulated minor repairs would be a major *cost*. He said: "After they put on the 82 new tractor pads and the 102 new links, that portion of the machine would be nearly new, but that doesn't effect the shafts which are liable to be crystallized, when you can't tell, or it might be the gears or pinions that might be worn. *All* those parts—but the biggest cost of the repairing is what we call a *major* repair . . . taking the word 'major,' what I mean is that it is the most *costly* part of the machine." [R. 80.]

Defendants also argue (their brief, p. 11) that the terms “minor repairs” and “field repairs” mean the same thing in the sentence, “All necessary minor *or* field repairs to equipment shall be made by the Lessee without cost to the Lessor,” since the disjunctive is used. The written agreement, as we pointed out in our opening brief, was prepared by the defendants and, hence, any ambiguity or uncertainty therein must be construed against defendants. Nothing could be more clear than that the parties themselves understood the language to mean that the defendants were obligated to make not only necessary minor repairs but necessary field repairs. An analysis of the repairs made by the defendants themselves during the operations [R. 24-25] discloses that they replaced numerous single parts at costs, for materials alone, ranging from \$60.00 to \$15.40 each, whereas, the most costly parts installed by plaintiffs in repairing the machine after its return from defendants, cost only \$14.20 each. (See our Op. Br. p. 37.)

While the word “or” is classified in our language as a disjunctive, its use is frequently synonymous with the conjunctive “and,” particularly where the sense requires. See Vol. 6, *Words and Phrases, First Series*, pp. 5002 *et seq.*, and *Id.*, Vol. 3, *Second Series*, pp. 757 *et seq.*, wherein numerous authorities are cited.

Defendants also argue (Appellees’ Br. p. 11) that the defendants were required to make only *necessary* repairs. But surely, this contemplated that they were to make such repairs as might be necessary to keep the machine in as good condition as when received, ordinary wear and tear excepted. As we understand it, defendants’ position is tantamount to contending that if the damaged machine

could be operated at all, no matter how defectively or inefficiently, repairs thereon would not be necessary; or, if the machine could be operated on the particular terrain—open country—in which defendants had been operating it, repairs would not be necessary, although the track pads might get so damaged and indented by running over rocks that the machine could not be operated on paved city streets. Defendants' witness Cavanaugh conveyed this thought when he testified: "It was not necessary to put on new pads to keep the machine running on *our* job." [R. 120.] Presumably, defendants decided the replacing of those pads, during the operations over rocky ground, would be ineffective because the rocks would immediately destroy new pads. Cavanaugh testified: "One time the machine was walked perhaps a mile, not at night. And then, when the job was finished on the west end, the machine was walked back again. Those were the two long walks." Undoubtedly, those two long walks would be sufficient to cause the condition of the track pads which defendants' witness Brownfield described as "in terrible shape." [R. 100.] But it would be most unreasonable to insist that repair of the track pads was not necessary before returning the machine to plaintiffs, whose normal use contemplated running it over and upon paved city streets in excavation of sewer trenches.

There is, of course, no express provision in the contract of lease requiring the defendants to return the machine in the same condition as when received, ordinary wear and tear excepted. The law, however, implies such a provision, unless there is in the contract some clear language relieving the defendants from that duty. But no provision in the contract does this. Article II

of the contract does not abrogate this common law duty. Article II merely provides who shall be obliged to make repairs on the machine while in use by defendants. Necessary minor or field repairs are to be at the expense of the defendants. Other repairs are to be at the expense of plaintiffs. [R. 7.] An instance of the character of repairs chargeable to plaintiffs are those contemplated in Article V of the contract wherein it is stated, "If such equipment is not in sound and workable condition when it arrives at the work site, the rental period therefor shall not begin until such equipment shall have been placed in sound and workable condition at the expense of the Lessor." [R. 8-9.] The repair work to comply with said provision would, of course, be "other than minor or field repairs."

Defendants make no claim that the equipment was not in sound and workable condition upon arrival at the site of the work, nor that plaintiffs were ever called upon to make other than minor or field repairs.

The reasonable interpretation of the contract is that it expressly required the defendants to bear the cost of certain classified repairs during the operations, but this did not relieve them from the common law duty to return the machine in as good condition as when received, ordinary wear and tear excepted. (8 C. J. S., Sec. 27, p. 278.)

Not only is the language of the contract consistent with the common law rule and, indeed, an expression of it, as we have already pointed out, but the undisputed evidence is that the parties to the contract so understood it. See Mr. Cavanaugh's testimony [R. 119-120] and that of the chief witness for the defendant, Collins, who testified that his instructions from the defendant were to ascertain

what was needed to put the machine in "supposedly the same condition as when it left here." [R. 71.] And Brownfield, the defendant witness who was charged with doing the repair work, testified that Mr. Cavanaugh instructed him "to put it in as good a repair as it was when it came down here." [R. 100-1.]

But whether we read into the contract the common law provision, or read only its express terms as to making repairs, the inevitable conclusion must be that the machine should have been returned in a repaired and not in a greatly damaged and unrepaired condition.

The Fallacy of Defendants' Position.

The fallacy of defendants' position below and here is that they consider the needed repairs, though viewed singly might be minor or field, were in the aggregate "major" rather than minor. They are, perhaps subconsciously, influenced by the cost of the repairs as a whole, rather than by the nature of the numerous repair jobs that were done. Convincing themselves that the repair job done by plaintiffs after the return of the machine, was a major one, they then proceed to fit the contract to their major premise and argue that the contract by implication required the plaintiffs to make all major, as distinguished from minor, repairs. This argument forces them to the untenable position of conceding that the work which was necessary to be done on the machine was of major character. Thus we find them admitting on page 11 "it seems quite probable that the machine was in need of other than necessary minor or field repairs which might be called major repairs, as distinguished from minor."

But we know what the repairs were. They were, for

example, the replacement of 82 tractor pads. Defendants' counsel would argue that each one of these 82 pads constituted a major repair job. Indeed they say so. Again on page 11: "The tractor pads, or multipedal slats, as they are sometimes called, were classified by Collins as a major repair job."

Even if Mr. Collins had so testified, it would be an untenable conclusion that the court would ignore; but he never so testified. The purport of his testimony was that, taking the job as a whole, it was major rather than minor. Obviously he was thinking of the cost of the job and of the time needed for its completion. He wouldn't have the right to tell the court that the replacement of each pad or of each link in the chain was a major repair job.

No one could deny the condition of these pads which the witness Brownfield himself said was "terrible" [R. 100], or that at least 102 links had to be replaced. The court below apparently fell into the error of counsel's reasoning as to the meaning of the contract and as to the nature of the repair work.

Defendants charge plaintiffs with attempting to arbitrarily change the lease contract so as to make it read differently from its express language. They charge that the plaintiffs maintain that the contract is ambiguous and that plaintiffs "very arbitrarily argue that the words requiring the defendants to make all necessary minor or field repairs is but another way of saying that the bailee should make all ordinary or incidental repairs and return the bailed machine in the same condition as when received, ordinary wear and tear excepted." "This, indeed," defendants say, "is a very simple method of altering the

terms of a contract so as to completely change the meaning thereof.” (Appellees’ Br. p. 15.)

Now, let’s see how arbitrarily plaintiffs have been in this connection.

As a matter of fact, it was defendants and not plaintiffs who first raised the question of ambiguity in the language of the contract. They put on their witness Dan Cavanaugh, their general superintendent on the job at Fort Huachuca, who had been 20 years in the contracting business and had experience with trenching machines. [R. 117-119.] Defendants’ counsel asked this expert witness: “Q. And what is meant by the phrase ‘necessary minor or field repairs’?” Whereupon objection was made on behalf of plaintiffs. Discussion and argument ensued, and the court overruled the objection [R. 119], after which the question was repeated, whereupon the witness answered: “A. Minor repairs, as I understand it, are repairs to keep the machine running.” Plaintiffs moved to strike the answer, because the meaning of the expression in the trade and not the understanding of the witness should be stated. The motion was granted. Thereupon, defendants’ counsel added to the question: “As generally used in the trade what does that expression mean?” [R. 120.]

It can thus be seen that defendants regarded the expression in the contract as ambiguous and as requiring explanation by an expert. Their witness answered. “A. It means to keep the machinery, the equipment running;

the repairs necessary or required to keep the equipment running on the job. Major repairs are considered such as overhaul repair, or some heavy shaft, tracks, or something like that, or it has to go into a shop or some place outside of the field shop. I think the term field repairs would be the same as minor repairs. It would mean the repairs or work necessary to be done on the machine in the field to keep it running. It was not necessary to put on new pads, repair the pads, to keep the machine running on our job. I regard the making of repairs on the chain links as necessary minor repairs or field repairs." [R. 120.]

Upon being turned over for cross-examination, this witness was asked by plaintiffs the following question: "Q. Now, Mr. Cavanaugh, is it not a fact that you considered those two terms in the contract as requiring you people to do the minor or field repairs and put you under the obligation to put the machine back into condition it was when you got it, ordinary wear and tear excepted?" And, without objection from defendants, he answered, "A. Yes, sir. That is what I considered those terms to mean in effect." [R. 121-122.]

It can thus be seen that plaintiffs' argument upon this matter is not arbitrary, but entirely consistent with evidence which defendants vigorously and against objection introduced.

We respectfully submit that our argument throughout has been consistent with the evidence and not arbitrary. We think this question has otherwise been adequately discussed by us in our opening brief, pages 30 to 38, inclusive.

Condition of the Machine When Received by Defendants.

On page 7 of their brief, defendants state:

“It is to be expected that the age of a piece of machinery is to be considered in estimating its workable condition, and the fact that it had not been repaired any for ten years also indicates that it would be in need of other than necessary minor or field repairs.”

It is true the machine was ten years in the possession of plaintiffs at the time of its lease to the defendants, but the undisputed fact is that during that time, which included the 1930-1940 depression, it was actually in operation only 10 or 11 months in soft soil without rocks. [R. 62.] When not working, it was stored in a galvanized shed, well protected, its tracks resting upon 12-inch planks. [R. 41, 48, 57.] These vital facts are not included in defendants' statement of the case “based upon the entire evidence.” Nor is any evidence of any kind cited to support the statement that when the machine was delivered to defendants it was “in need of other than necessary minor or field repairs,” or any repairs whatsoever.

Counsels' statement is the more surprising to us in the face of defendants' answer wherein they “admit the allegations of paragraphs I to IV, inclusive,” of plaintiffs' complaint [R. 22], paragraph III of which complaint having alleged that at the time the machine was delivered to defendants it “was in a condition to render efficient, economic and continuous service”; also in face of the positive testimony of defendants' own witnesses: that it was “in first class condition throughout” [Collins, R. 81],

that it was "in very good shape at the time it was delivered at the project" [Brownfield, R. 96], and that it was "in very good condition." [Cavanaugh, R. 118.]

We should like to know what could happen to a machine of this character while stored and well cared for for the greater portion of ten years in a well protected shed, that would require "other than necessary minor or field repairs," or any repairs. No witness has been produced to answer that question. Because of defendants' admission, it was not plaintiff's duty to produce such witness. Defendants' witnesses, however, proved conclusively, as above shown, that the machine was in excellent condition when received by defendants.

Condition of Machine When Returned to Plaintiffs.

Defendants state on page 4 of their brief:

"When the trenching machine was returned to the plaintiffs at Los Angeles it was in as good condition as when it was delivered, except for the pads on the caterpillar treads and except for the fact that there were welded buckets instead of new buckets. [R. 103.]"

This statement in itself is an admission by defendants that the machine was in a damaged and unrepaired condition in so far, at least, as the track pads and the buckets were concerned and conclusively establishes that the court's findings of fact 8 [R. 135] is contrary to and not supported by the evidence. But the above quoted statement, extracted from the testimony of defendants' witness Brownfield, gives only a part of Brownfield's testimony as to the damaged condition of the machine upon its

return to plaintiffs. He also testified that 25 per cent of the links on the excavator chain were in bad shape. [R. 108, 109, 110.]

It is evident that Brownfield's estimate of 25 per cent was ultra conservative. He testified he didn't measure any links and said: "The links may have been off pitch quite a bit, but seemingly, to look at it, I would say that 75% of the chain was in fair shape." We have, thus an admission by this witness produced by defendants, that the track pads were damaged and unrepaired, that the buckets were damaged, and that at least 25 per cent of the excavator links, that is, at least 45 links, were in bad shape.

Defendants also ignore the testimony of their own witness Collins, who, after making an examination of the machine at their request, reported to them, "There were 102 excavating chain links that were bent, drawn out of shape, and worn down to a point where they were dangerous to operate." [R. 75.] Defendants' witnesses, Brownfield and Collins, are not contradicted, in so far as their above quoted statements are concerned by any competent witness in the case, not even by defendants' witness, Snelling, on whose testimony they place so much reliance. Snelling makes no positive statement regarding the condition of the excavator chain links or the multipedal track pads. All he states generally is that "so far as he could see from watching the machine operate, it seemed to be in a reasonably good state of repair" [R. 114], and

this statement is effectively nullified by his subsequent testimony. He was merely a city inspector interested only in seeing that the work was done according to contract. He was not an expert and was frank to state that he couldn't tell whether the machine was efficiently operating or not. He couldn't tell the parts of the machine. [R. 115.] The only reason he gave for his statement that the machine "seemed" to be in reasonably good condition was "because there were no breakdowns." He said he didn't inspect the machine [R. 116] and he finally admitted that there could be a lot wrong with that machine and he would never know about it even if he inspected it. He never looked at the track pads in the machine. [R. 117.]

Snelling's testimony, therefore, does not contradict the competent, positive, direct statements of plaintiffs' witnesses, Culjak and Devine, and of defendants' witnesses, Collins and Brownfield.

There is, therefore, no dispute whatever of the fact that the machine was returned in a damaged and unrepaired condition. The only disagreement between the plaintiffs' and defendants' witnesses is as to the *extent* of the damages to the excavator chain links. Plaintiffs' witnesses testified that practically all the links had to be replaced, although there were 9 or 10 good links, but they testified that to detach these from the various places in the old chain where they were encountered and to provide them with new pins and bushings and then to attach them to the new chain would cost practically as much as 9 or 10 links. Collins confirmed this. It would be repetitious to further discuss this matter which is extensively considered on pages 15 to 21, inclusive, of our opening brief.

Use of Machine by Plaintiffs Before Making Repairs Thereon.

Defendants insist that, because plaintiffs put the machine to work immediately upon its return from Fort Huachuca, it must not have been in need of repairs. But, as already pointed out by us, plaintiffs promptly notified defendants of the damaged condition of the machine, and defendants evidenced an apparent intention to repair it by causing an inspection to be made by Collins.

We shall not here repeat what we previously said on this question at pages 23 to 26, inclusive, of our opening brief. We, therefore, respectively refer to said brief at said pages as our reply to defendants.

Materiality of Rentals Paid.

We are at a loss to understand how the defendants expect to convince anyone that because they paid the rent stipulated in the contract of lease, the owners of the trenching machine should overlook the damaged condition of the machine upon its return and not insist upon their claim for compensation for repairs.

It must be remembered that plaintiffs did not themselves set the rate of rental. That was fixed by defendants' representative. The good faith of the defendants is manifested throughout. They delivered their valuable machine to defendants without a written contract. They permitted defendants to prepare their own contract which they unhesitatingly signed when forwarded to them later for

signature. They accepted the verbal assurance of defendants that their machine would not be used upon work that would be injurious to it. They did not claim compensation for all the damages to which they might be justly entitled. When they first called defendants' attention to the damages, they said: "There are several other things that we will have to repair on said trenching machine to put it in workable condition, but we are overlooking all those things if we are going to get this excavation chain and troweling track." [R. 35-36.] If the defendants had thought that they could make the repairs more cheaply than plaintiffs, they were given that privilege. Although the machine was laid up for repairs from August 28, 1941, to September 16, 1941, only one month's rental for deprivation of its use was asked. The rental fixed by defendants was in fact less than the customary rate. The machine was valued by defendants at \$20,000.00. [R. 14.] They would be entitled to demand 10% of this valuation as monthly rent, but they accepted defendants' rate. Having thus acted in what seems to us the maximum of good faith, we cannot see how defendants can resort to the irrelevant argument that because defendants complied with their obligation in one particular, they should be relieved from it in another.

Conclusion.

We wish to emphasize, in conclusion, that we are not asking this Court to weigh the evidence admitted before the trial court and to substitute their own decision for the decision below. We confidently assert that the material findings of fact of the Court are wholly unsupported by any competent evidence. Thus, the matter becomes solely a question of law. The undisputed evidence establishes that the leased machine was returned to the lessors in a very damaged and unrepaired condition, and the undisputed evidence likewise establishes that the defendants failed to fulfill their duty with respect to repairs of the machine while in their possession as lessees.

Dated: August 17, 1944.

FRANK J. BARRY,
Los Angeles, California;
CONNER & JONES,
By GERALD JONES,
Tucson, Arizona,
Attorneys for Appellants.

No. 10773

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK LAURENT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

OCT 10 1944

PAUL P. O'BRIEN,
CLERK

No. 10773

United States
Circuit Court of Appeals
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FRANK LAURENT,

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vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Northern District of California.

Post Office Building,
San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California

(28385-S)

INDICTMENT

(Title 18 U.S.C.A. 88)

In the November 1943 term of said Division of said District Court, the Grand Jurors thereof, upon their oaths present: That

RUSSELL S. YOUMANS,
PERCY NEWFORD,
ARTHUR GRENIER,
ALBERT NORWITT,
FRANK LAURENT,
CHARLES E. CORSIGLIA, and
BERNARD R. KERNS,

whose full and true names, and the full and true name of each of whom, except as herein mentioned, are otherwise unknown to this Grand Jury, (hereinafter called "said defendants"), at a time and place to the Grand Jurors unknown, did knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree together, and with divers other persons to the Grand Jurors unknown, unlawfully and feloniously to commit offenses against the United States of America, to-wit, violations of the Second War Powers Act, Title 50 U.S.C.A. Section 633, and rationing regulations prescribed and made in pursuance of the authority granted in said Second War Powers Act pertaining

to a rationed commodity, [*1] to-wit, gasoline, and to defraud the United States of America, in the exercise and control of its lawful governmental powers and functions, by impairing, obstructing and defeating the due and proper administration of the Second War Powers Act, and ration regulations made in pursuance of the authority granted in said Act, and the rules and regulations prescribed in reference thereto for the enforcement of the provisions of said Act, in the manner following, to-wit:

(a) By the said defendants and each of them unlawfully and wilfully acquiring, using, permitting the use of, possessing and controlling counterfeited and forged ration documents, to-wit, counterfeited and forged C-2 gasoline mileage ration coupons, under circumstances which would be in violation of Section 2.6 of General Ration Order No. 8 if the said counterfeited and forged ration documents were genuine, that is to say, the said defendants, or any of them, were not then and there or at any time, persons, or the agent or agents of persons, to whom said C-2 gasoline mileage ration coupons were issued, or by whom said C-2 gasoline mileage ration coupons were acquired in accordance with the provisions of Ration Order No. 5 (c), as the said defendants then and there well know.

(b) By the said defendants, and each of them, unlawfully and wilfully transferring and assigning counterfeited and forged ration documents, to-wit,

*Page numbering appearing at foot of page of original certified Transcript of Record.

counterfeited and forged C-2 gasoline mileage ration coupons, under circumstances which would be in violation of Section 2-6 of General Ration Order No. 8 if the said counterfeited and forged ration coupons were genuine, that is to say, the said defendants were not then and there, or at any time, persons, nor the agent or agents of any persons, to whom said ration documents were issued, or by whom said ration [2] documents were acquired in accordance with the provisions of a ration order, nor were said defendants, or any of them, then and there, or at any time, persons authorized to so transfer or assign said ration documents in accordance with the provisions of a ration order, to-wit, Gasoline Mileage Ration Order No. 5 (c), or any other ration order, as the said defendants then and there well knew.

(c) By the said defendants and each of them, with the intent and for the purpose of defrauding the United States in the exercise and control of its lawful governmental powers and functions, impairing, obstructing, frustrating and defeating the due and proper administration of the Second War Powers Act, and the ration regulations promulgated and issued thereunder pertaining to a rationed commodity, to-wit, gasoline, by unlawfully acquiring, using, permitting the use of, transferring, possessing and controlling counterfeited and forged ration documents, to-wit: counterfeited and forged C-2 gasoline ration coupons, under circumstances which would be in violation of Section 2.6 of General Ration Order No. 8 if the said counterfeited and

forged ration documents were genuine, that is to say, said defendants, or any of them, were not at any time persons or the agent or agents of persons to whom such ration documents were issued or by whom the same were acquired from a War Price and Rationing Board of the Office of Price Administration, a department and agency of the United States, in accordance with Ration Order 5 (c) or any other ration order, nor did said defendants, or any of them, transfer said ration documents in accordance with the provisions of Ration Order No. 5 (c) or any other ration order; and by unlawfully acquiring, using, permitting the use of, transferring, possessing and controlling counterfeited and forged ration [3] documents, to-wit, counterfeit and forged C-2 gasoline mileage coupons, with the intent and for the purpose of unlawfully obtaining for themselves and each of them, and with the intent and for the purpose of enabling other persons to the Grand Jurors unknown to unlawfully obtain a rationed commodity, to-wit, gasoline, to which said defendants, or any of them, or any of said persons, were not at any time herein mentioned entitled, by the use and transfer of said counterfeited and forged documents.

(d) By the said defendants, and each of them, obtaining and attempting to obtain for themselves, and each of them, and for other persons to the Grand Jurors unknown, a rationed commodity, to-wit, gasoline, without presenting the prescribed ration coupons therefor; that during the existence

of said conspiracy and in furtherance thereof, and to effect its objects, in the said Division and District, and within the jurisdiction of this Court, one or more of said defendants, as hereinafter mentioned by name, did the following overt acts, to-wit:

1. That on or about the 10th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Percy Newford transferred to the said defendant Arthur Grenier, 6 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

2. That on or about the 9th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Arthur Grenier met and held a conversation with one Angelo Guisti.

3. That on or about the 9th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Arthur Grenier met and held a conversation with one Dominic Rossi. [4]

4. That on or about the 16th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Percy Newford transferred to one Angelo Guisti, 16 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

5. That on or about the 16th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Russell S. Youmans transferred to the said defendant Albert

Norwitt, 25 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

6. That on or about the 16th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Russell S. Youmans transferred to the said defendant Percy Newford, 30 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

7. That on or about the 6th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Russell S. Youmans transferred to the said defendant Charles E. Corsiglia, 9 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

8. That on or about the 6th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Charles E. Corsiglia transferred to the said defendant Bernard R. Kerns, 9 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

9. That on or about the 11th day of February, 1944, in the City and County of San Francisco, State of California, [5] the said defendant Percy Newford transferred to the said defendant Frank Laurent, 40 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

10. That on or about the 16th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Russell S. Youmans, at his residence at 915 Pacific Avenue, San Francisco, California, had in his possession, 1258 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

FRANK J. HENNESSY

United States Attorney.

(Approved as to Form: R. B. McM.)

[Endorsed]: A true bill, Ernest L. West, Foreman. Presented in Open Court and Ordered Filed Mar. 1, 1944. C. W. Calbreath, Clerk. By J. P. Welsh, Deputy Clerk. [6]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 11th day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present: the Honorable A. F. St. Sure, District Judge

[Title of Cause.]

No. 28385

PLEA OF NOT GUILTY

This case came on regularly this day for arraignment. The defendants were present in proper person and with their respective attorneys, viz: Fred McDonald, Esq., for defendant Russell S. Youmans; Nathan C. Coghlan, Esq., for defendant Percy Newford; Joseph L. Sweeney, Esq., and Harmon D. Skillin, Esq., for defendant Arthur Grenier; Sol A. Abrams, Esq., for defendant Albert Norwitt; Walter Duane, Esq., for defendant Frank Laurent; James B. O'Connor, Esq., for defendant Charles E. Corsiglia; Edward O'Day, Esq., for defendant Bernard R. Kerns. Valentine C. Hammack, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Hammack, the defendants were called for arraignment. All defendants were informed of the return of the Indictment by the United States Grand Jury, and asked if they were the persons named therein, and upon their answer that they were, and that their true names were as charged, said defendants were informed of the charges against them and stated that they understood the same. Attorneys for defendant waived the reading of the Indictment.

The defendants were called to plead and thereupon each of the above-mentioned defendants asked

for continuance to March 18, 1944, to plead, except defendant Frank Laurent who pleaded "Not Guilty" to the Indictment, and which said pleas was ordered entered. [7]

After hearing the attorneys, it is ordered that this case as to the defendant Frank Laurent be continued to March 18, 1944 to be set for trial; and as to all others to March 18, 1944 to plead. [8]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28385-S

THE UNITED STATES OF AMERICA

vs.

RUSSELL S. YOUMANS, PERCY NEWFORD,
ARTHUR GRENIER, ALBERT NORWITT,
FRANK LAURENT, CHARLES E. COR-
SIGLIA, and BERNARD R. KERNS.

VERDICT

We, the Jury, find Frank Laurent, the defendant
at the bar, Guilty.

L. G. FEYEN

Foreman.

[Endorsed]: Filed at 3 o'clock and 59 Min.
P.M., May 3, 1944. C. W. Calbreath, Clerk. By
Edward A. Mirchell, Deputy Clerk. [9]

[Title of Court and Cause.]

MOTION FOR A NEW TRIAL

Now Comes the defendant, Frank Laurent, in the above entitled action and moves this Honorable Court for an order vacating the verdict of the jury convicting him and granting him a new trial on the indictment herein, for the following and each of the following causes, materially affecting the constitutional rights of said defendant:

1. That the verdict is contrary to the evidence adduced at the trial herein;

2. That the verdict is not supported by the evidence in the cause;

3. That the evidence adduced at the trial is insufficient to justify said verdict;

4. That the verdict is contrary to law;

5. That the trial court erred in admitting evidence in the course of the trial, which was incompetent, irrelevant and immaterial, which errors were duly and regularly excepted to by the defendant;

6. That the trial court erred in refusing to direct a verdict of not guilty at the close of the evidence of the United States;

7. That the trial court erred in refusing to strike out certain testimony which was incompetent, irrelevant, immaterial and hearsay;

8. That the trial court erred in refusing to direct a verdict of not guilty at the close of all of the evidence;

9. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid. [10]

This motion is made upon the minutes of the court and upon all records and proceedings in said action and upon all of the testimony and evidence introduced at the trial.

Dated: May 4th, 1944.

WALTER H. DUANE

Attorney for Defendant

[Endorsed]: Filed May 4, 1944. [11]

[Title of Court and Cause.]

MOTON IN ARREST OF JUDGMENT

Now Comes, Frank Laurent, the defendant in the above entitled action, against whom a verdict of guilty was rendered on the 3rd day of May, 1944, in the above entitled cause and moves the Court to arrest the judgment against him and hold for naught the verdict of guilty rendered against him.

1. That the indictment does not state facts sufficient to constitute a public offense under the laws of the United States;

2. That the evidence is not sufficient to support the verdict.

3. That the verdict of the jury is contrary to law.

Wherefore because of which said errors in the record herein, no lawful judgment may be rendered by the Court and the defendant prays that this mo-

tion be sustained and the judgment of conviction against him be arrested and held for naught, and that said defendant have all such other orders as may seem meet and just in the premises.

Dated: May 4, 1944.

WALTER H. DUANE

Attorney for Defendant

[Endorsed]: Filed May 4, 1944. [12]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 4th day of May, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable A. F. St. Sure, District Judge.

[Title of Cause.]

No. 28385

ORDER DENYING MOTION IN ARREST OF
JUDGMENT AND MOTION FOR NEW
TRIAL—JUDGMENT AND SENTENCE

This case came on regularly this day for the pronouncing of judgment. The defendant was present in the custody of the United States Marshal and with his attorney, Walter Duane, Esq. Valentine C.

Hammack, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called for judgment. Mr. Duane made a motion in arrest of judgment, which said motion was ordered denied. Mr. Duane then made a motion for new trial, which said motion was likewise ordered denied. After hearing the attorneys and Officer Frank Brush, who was sworn and testified on behalf of the United States; and the said defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

Ordered and Adjudged that the defendant, Frank Laurent, [13] for the offense of which he stands convicted on the verdict of the jury of guilty as to the Indictment herein, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two (2) Years and pay a fine to the United States of America in the sum of Five Thousand (\$5,000.00) Dollars.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a U. S. Penitentiary. [14]

District Court of the United States, Northern
District of California, Southern Division

UNITED STATES

v.

FRANK LAURENT

No. 28385-S Criminal Indictment in one count for violation Title 18 U. S. C. A. 88—Conspiracy to violate Second War Powers Act and rationing regulations.

JUDGMENT AND COMMITMENT

On this 4th day of May, 1944, came the United States Attorney and the defendant Frank Laurent appearing in proper person, and by counsel, and, The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Violation of Title 18 U.S.C.A. 88. Defendant did, at a time and place unknown, unlawfully conspire to violate the Second War Powers Act, Title 50 U.S.C.A., Section 633, and certain rationing regulations made in pursuance thereof, and in furtherance of said conspiracy said defendant did certain overt acts to accomplish said conspiracy at San Francisco, California—(Possessing and transferring counterfeited and forged Gasoline Mileage Ration Coupons), and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court Ordered and Adjudged that the defendant, having

been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two (2) Years, and pay a fine to the United States of America in the sum of Five Thousand (5,000.00) Dollars.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

V. C. Hammack,

Assistant U. S. Attorney

(Signed) A. F. ST. SURE

United States District Judge.

The Court recommends commitment to a U. S. Penitentiary.

Filed and Entered this 4th day of May, 1944.

(Signed) C. W. CALBREATH

Clerk.

By EDWARD A. MITCHELL

Deputy Clerk

Entered and Filed in Vol. 34 Judg. and Decrees
at Page 361. [15]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Frank Laurent, 740 Post Street, San Francisco, California.

Name and Address of Appellant's Attorney:
Walter H. Duane, Esq., 790 Mills Building, 220
Montgomery Street, San Francisco, 4, California.

Offense: Conspiracy to violate the Second War
Powers Act, Title 50 U.S.C.A. Section 633, as fol-
lows:

That the defendant, with others, in the City and
County of San Francisco, State of California, with-
in said Division and District, conspired, confeder-
ated and agreed with other persons unlawfully to
acquire, use, permit the use of, possess and control
counterfeited and forged ration documents, to-wit:
counterfeited and forged C-2 gasoline mileage ra-
tion coupons, and in pursuance of said conspiracy
and to accomplish the purpose there- [16] of on
the 11th day of February, 1944, in the City and
County of San Francisco, State of California, one
Percy Newford, a co-defendant in said action, trans-
ferred to the said defendant 40 sheets, each sheet
containing 64 counterfeited and forged C-2 gaso-
line mileage ration coupons.

Date of Judgment: May 3, 1944.

Description of Judgment and Sentence: "Guilty"
as charged in said indictment, as above set forth;
two years imprisonment in a Federal Penitentiary
to be designated by the Attorney General of the
United States and a fine of Five Thousand Dollars
(\$5,000.00).

Name of Prison Where Now Confined: County
Jail of the City and County of San Francisco.

I, the above named appellant, hereby appeal to
the United States Circuit Court of Appeal of the

Ninth Circuit, from the judgment above mentioned, on the grounds set forth below:

GROUND OF APPEAL

1.

That the learned Trial Judge committed errors in law arising during the course of the trial, and erred in the decision of questions of law arising during the course of the trial.

2.

That the evidence produced and received upon the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

3.

That the learned Trial Judge erred in denying the motion made by counsel for defendant for a directed verdict of "Not Guilty" at the conclusion of the case of the prosecution, for the reason that taking said evidence in said case is not sufficient as a matter of law to support a verdict of "Guilty". [17]

4.

That the Trial Court erred in not instructing the jury to return a verdict of "Not Guilty" in favor of appellant.

Dated: May 4, 1944.

FRANK LAURENT

Appellant

WALTER H. DUANE

Attorney for Appellant

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed May 4, 1944. [18]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday, the 13th day of May, in the year of our Lord, one thousand nine hundred and forty-four.

No. 28385

[Title of Cause.]

Present: the Honorable A. F. St. Sure, District Judge.

INSTRUCTIONS, RE APPEAL; ETC.

This case came on regularly this day for instructions re appeal. Due consideration having been thereon had, the Court ordered that the defendant have thirty (30) days to file his proposed Bill of Exceptions, that the United States have fifteen (15) days to file proposed Amendments, thereto, and that the defendant have ten (10) days thereafter within which to settle said Bill of Exceptions. Ordered that this case be set for July 17, 1944 for settling the Bill of Exceptions. [19]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes Frank Laurent, appellant in the above entitled action, in connection with his notice

filed with the Clerk of the above entitled court stating that he appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment and sentence entered in the above entitled cause against him, and he having duly given notice of appeal, as provided by law, now makes and files the following Assignment of Errors herein, upon which he will rely for a reversal of the judgment and sentence upon appeal and which errors and each of them are to the great detriment, injury and prejudice of said defendant and in violation of the rights conferred upon him by law; and said defendant says that in the reported proceedings of the above entitled cause upon the hearing and determination thereof, in the Southern Division of the United States District Court for the Northern District of [20] California, there is manifest error in this, to-wit:

I.

That the District Court erred in admitting the following testimony over the objection of defendant:

Following this meeting with Youmans, I met the defendant Frank Laurent, who I recognize in the courtroom and whom I have known for a number of years. I had a conversation with him at our office at 1355 Market Street in the forenoon of February 23, 1944. At this meeting Mr. Worthington, Chief Criminal Investigator for our office was present.

“Q. At this time and place, what was the conversation you had with Mr. Laurent, please?

“Mr. Duane: I object to that on the ground it is incompetent, irrelevant, and immaterial, and the proper foundation has not been laid and the corpus delicti has not been established.

“The Court: Overruled.

“Mr. Duane: Exception.”

II.

That the District Court erred in admitting the following testimony over the objection of defendant:

“Mr. Hammack: At this time I will offer in evidence Government’s Exhibit No. 1 for Identification and ask that it be marked Government’s Exhibit next in order in evidence.

“The Court: Admitted.

“Mr. Hammack: 1258 sheets of counterfeit coupons.

“Mr. Duane: For the record, we will object on the ground it is incompetent, irrelevant, and immaterial, and not binding on the defendant on trial.

“The Court: Overruled.

“U. S. Exhibit 1 For Identification was thereupon admitted in evidence.

“Mr. Duane: Exception.” [21]

III.

That the District Court erred in denying the motion of the defendant for an advised verdict of not guilty, the grounds of said motion being:

First: There has been no proof of any conspiracy here;

Second: Nothing has been offered to establish a conspiracy;

Third: And on the admission by the Government that the defendant had no knowledge that the coupons involved were counterfeited or forged.

“The Court: I suggest you submit it now and I will deny your motion, but you will have an opportunity to present it later to the Court.

“Mr. Duane: Very well, your Honor.

“The Court: The motion will be denied.”

To the denial of which motion for an advised verdict the defendant duly excepted.

IV.

That the District Court erred in refusing to grant a motion to strike, as follows:

“Mr. Duane: At this time, if the Court please, I want to move to strike out the testimony of the witness Brush that has to do with his transactions or his activities as respects the man Youmans, on the ground that it is incompetent, irrelevant, and immaterial. It is hearsay and not binding on the defendant in this case.”

To the denial of said motion the defendant duly excepted.

V.

That the District Court erred in denying the motion of defendant for a directed verdict at the conclusion of the testimony in behalf of the United States. The grounds of said motion were: [22]

“Mr. Duane: First, that no conspiracy has been established. Second, that the indictment charges

or attempts to charge an offense which in fact is no offense and no violation against the law of the United States. And, third, any transaction between Newford and Laurent would not be an overt act in furtherance of an alleged conspiracy.”

To the denial of said motion for a directed verdict, the defendant duly excepted.

VI.

That the District Court erred in denying the defendant’s motion for a new trial, to the denial of said motion for a new trial the defendant duly excepted, and which motion is fully set forth in the Bill of Exceptions herein.

VII.

That the District Court erred in denying the defendant’s motion in arrest of judgment, to the denial of said motion in arrest of judgment the defendant duly excepted, and which motion is fully set forth in the Bill of Exceptions herein.

Wherefore, because of the manifest errors committed by the Court, the defendant prays that said judgment and conviction and sentence be reversed, and for such other and proper relief as to the Court may seem meet and proper.

Dated: San Francisco, California, June 15th, 1944.

WALTER H. DUANE

Attorney for Defendant and
Appellant

Receipt of a copy of the foregoing Assignment of Errors is hereby admitted this 16th day of June, 1944.

FRANK J. HENNESSY,
United States Attorney
By F. SOLOMON

[Endorsed]: Filed Jun. 16, 1944. [23]

[Title of Court and Cause.]

PRAECIPE ON APPEAL

To the Clerk of the above entitled Court:

The appellant herein respectfully requests the inclusion of the following as part of the record on appeal herein:

1. The indictment.
2. Plea of defendant.
3. Verdict.
4. Judgment and sentence.
5. Motion for a new trial.
6. Motion in arrest of judgment.
7. Order denying new trial.
8. Order denying motion in arrest of judgment.
9. Order extending time re: bill of exceptions.
10. Notice of appeal.
11. Bill of exceptions.
12. The assignment of errors.
13. Stipulation re: bill of exceptions.
14. Order settling, allowing and authenticating bill of exceptions.

Dated: July 12th, 1944.

WALTER H. DUANE

Attorney for Appellant.

[Endorsed]: Filed Jul. 12, 1944. [24]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that heretofore the Grand Jury of the United States in and for the Southern Division of the Northern District of California, did present and return in and before the above entitled Court its indictment against Russell S. Youmans, Percy Newford, Arthur Grenier, Albert Norwitt, Frank Laurent, Charles E. Corsiglia and Bernard R. Kerns; that said defendants upon being plead to said indictment entered a plea of guilty; that said defendant Frank Laurent, answering to his true name Frank Laurent pleaded not guilty to said indictment and the cause being at issue the same came on regularly for trial on the 2nd day of May, 1944, before the Honorable A. F. St. Sure, United States District Judge, and a jury was duly impaneled to try the cause, the United States being represented by Valentine C. Hammack, Esq., Assistant United States Attorney, and the defendant, Frank Laurent, [25] being represented by Walter H. Duane, Esq., the following proceedings were then had.

Thereupon the United States, to maintain the issues on its part to be maintained, called as its first witness Frank Brush.

TESTIMONY OF FRANK BRUSH FOR THE UNITED STATES

Frank Brush, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

I am an investigator for the Office of Price Administration and was so employed during February 1944. I know the defendant in this case, Russell Youmans. With two police inspectors I met Mr. Youmans at his home, 915 Pacific Avenue, San Francisco, at approximately 7:30 P. M. on February 16. After a conversation with Youmans, Mr. Youmans turned over to me a suitcase containing 1258 sheets of C-2 counterfeit coupons, and also \$10,472. I recognize these as the coupons delivered to me by Mr. Youmans and consist of 1258 sheets of 64 C-2 coupons to the sheet.

“Mr. Hammack: At this time I offer these coupons for identification and ask that they be marked Government’s first exhibit in order for identification.”

Thereupon the coupons were marked “U. S. Exhibit 1 For Identification”.

At this time he turned over to me \$10,482.00, all in currency.

“Mr. Hammack: At this time I offer in evidence for identification the \$10,482.”

Thereupon the currency was marked “U. S. Exhibit 2 For Identification”.

Following this meeting with Youmans, I met the defendant Frank Laurent, who I recognize in the

(Testimony of Frank Brush.)

courtroom and whom I have known for a number of years. I had a conversation with him at our [26] office at 1355 Market Street in the forenoon of February 23, 1944. At this meeting Mr. Worthington, Chief Criminal Investigator for our office was present.

“Q. At this time and place, what was the conversation you had with Mr. Laurent, please?”

“Mr. Duane: I object to that on the ground it is incompetent, irrelevant, and immaterial, and the proper foundation has not been laid and the corpus delicti has not been established.

“The Court: Overruled.

“Mr. Duane: Exception.”

(Exception No. 1).

I told Laurent I had in my possession bingo sheets turned in by his station with his name on them and asked him how he had acquired them and he said he had acquired them in the normal course of business and that he had exchanged five gallons of gasoline for each C-a ration coupon that appeared on the sheets. He stated that the license numbers appearing on the coupons were put there by the customers and that he had not put them there and that he had delivered gasoline for every license number appearing on the sheets. I told him that 325 of the 387 - C-2 ration coupons appearing on the bingo sheets were counterfeits. I further informed him that he could not have taken the counterfeit coupons if he had checked the license number with the

(Testimony of Frank Brush.)

coupon, as the sheets did not have identification on the top and showed him that the counterfeit coupon would not fluoresce under our lamp and the genuine coupons would. He said he did not know anything about it and I told him I was going to call on the people whose license numbers appeared on the coupons and he told me to do as I pleased.

These five bingo sheets shown me were handed in by the service station to the distributor for replacement of gasoline in his stock. The name appearing on these bingo sheets is Frank Laurent, 750 Post Street, San Francisco. At that time I showed [27] Mr. Laurent the first group and subsequently two other sheets came in, after I talked to him. Mr. Laurent admitted the bingo sheets were his and he stated he delivered gasoline to every person thereon. I have checked the coupons and identified the counterfeit ones from the genuine ones. I examined all the coupons on the bingo sheets and there are 387 coupons thereon, of which 325 are counterfeit. Mr. Laurent stated he had obtained gasoline from the distributor in exchange for those.

“Q. Did you make any marks to separate them?

A. Yes, sir. The ones marked ‘X’ on the face of the coupon are genuine. The balance are counterfeits.

“Mr. Duane: I am going to object to this testimony on the ground the proper foundation has not been laid. This witness has not qualified to testify to the genuineness of these stamps, or those that are fictitious.

(Testimony of Frank Brush.)

“The Court: Overruled. You will have an opportunity to go into that matter later.

“Mr. Duane: Exception.”

(Exception No. 2)

“The Court: If the Government fails to produce the proper evidence to support the charge, you may move to strike it out.”

“Mr. Hammack: Q. Now, Mr. Brush, will you state whether or not appearing on those bingo sheets or on those coupons there appears the license number 48-E-603?

A. Yes, sir; 48-E-603.

“Q. How many coupons are there with the license number 48-E-603? A. Four.

“Q. Did you examine those to determine whether or not they were counterfeit or genuine?

“Mr. Duane: I am going to object to that on the ground it is incompetent, irrelevant, and immaterial, calling for the conclusion and opinion of the witness, and no foundation for it.

“The Court: Overruled. [28]

“Mr. Duane: Exception.”

(Exception No. 3.)

“A. I examined the four coupons in question by placing them under the fluorescent lamp supplied by the Secret Service, which will detect Government safety paper as against non-issue Government paper. In other words, the counterfeit coupon will not fluoresce. That is, the water marks

(Testimony of Frank Brush.)

put in by the Government printing establishment will not come out. On the counterfeit coupon, the coupon is absolutely lifeless. On these four coupons in question I examined them and the coupons were found to be counterfeit and not on Government safety paper."

"Mr. Duane: I move to strike that out on the ground there is no foundation laid for it. The witness is not qualified to testify to the matter just stated.

"The Court: Denied.

"Mr. Duane: Exception."

(Exception No. 4.)

I have a license number 22-H-810 on two coupons and those coupons are counterfeit. I have a license number 01-G-627 on two coupons and they are both counterfeit. I have a license number 24-B-575 on three coupons on this bingo sheet and they are counterfeit. There are three coupons with the license number 02-G-699 and they are counterfeit. There is a license number 70-A-319 on one coupon and that coupon is counterfeit. License number 32-B-786 is on two coupons and these coupons are counterfeit. I examined two coupons containing license number 99-F-271 as they appeared on that bingo sheet and they were counterfeit. Three counterfeit coupons appear on license number 26-B-996. On the other coupons bearing license numbers I was unable to locate anyone who had such a license number or locate such a license number. They are license numbers which have

(Testimony of Frank Brush.)

been issued by the State of California but I was unable to contact the balance of the [29] license numbers and did not receive a reply to letters sent them. We sent out letters and some letters came back with the notation no such person. Only those I have testified to I was able to locate.

“Mr. Hammack: Q. Would you say there were license numbers issued by the State of California or would you say they were fictitious license numbers.

“Mr. Duane: We will object to that, if the Court please.

“The Court: Overruled.

“Mr. Duane: Exception.”

(Exception No. 5.) [30]

These license numbers which I was unable to contact are fictitious license numbers in that they have not been issued since 1941 or 1942 and they are not now alive.

The license numbers we took off the bingo sheets we sent to the Department of Motor Vehicles in Sacramento and they returned the names and addresses of the parties to whom the license numbers had been issued and we then contacted these people. When we received the names and addresses of the persons whose license numbers appear on those bingo sheets we endeavored to communicate with them by letter and some of the letters were returned. A great number of the license numbers that were returned had still been issued and the last time of issuance would be 1941 or 1942. There was no 1944 issuance, but the license number would be returned

(Testimony of Frank Brush.)

with the last license issued to the name and address of the party. We endeavored to contact these people and in some instances the letter was returned, no such number and the license was dead. In several instances of license numbers returned we found the automobile had been junked but the license number was still active. I am aware that no license numbers have been issued since 1942, but they would still have the plate and they would have this issuing number returned from the Motor Vehicle Department for 1942 or 1943.

On February 16th when I secured the sheets of coupons from Youmans I did not know they were counterfeit. As far as I know none of the people who were working with me knew they were counterfeit at that time.

TESTIMONY OF PERCY NEWFORD FOR THE UNITED STATES

Percy Newford, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows: [31]

“Mr. Hammack: At this time I offer these sheets of coupons the witness (Brush) identified and testified in connection therewith, and which are marked for identification, in evidence, and ask that they be marked Government’s exhibit next in order.

“The Court: The 1258 sheets?

“Mr. Hammack: No. The 1, 2, 3, 4, 5, 6, 7

(Testimony of Percy Newford.)

sheets, containing a total of 385 coupons, of which 325 are counterfeit.

“The Court: Very well. Admitted.”

Thereupon seven bingo sheets with coupons on were marked “U. S. Exhibit 3 In Evidence.”

Direct Examination of

PERCY NEWFORD

I am a longshoreman and I am a defendant in this case, having pleaded guilty to the indictment and am awaiting the judgment of the court. I know the defendants Russell Youmans and Frank Laurent. I met Frank Laurent, whom I recognize in the courtroom, about November or December, 1943. I met him at his garage at 740 Post Street about four o'clock. I had a conversation with Mr. Laurent in which I asked him if he wanted any gas tickets and he said yes he could use a couple and I sold him a couple, 64 coupons in each sheet, for \$20.00 a sheet. I got these coupons from Mr. Youmans. I met Laurent again about nine o'clock at night between the latter part of January and the 10th of February, at a Russian Tea House on Geary Street between Fillmore and Steiner. He came in with some other gentleman. I had a conversation with the defendant in which he stated he needed a lot of gas sheets and he said he would give me \$600.00 for 40 of them. At that time I told him I did not want to have anything to do with them and he said if you don't sell them I can go right down to Pacific Street to the same address you get

(Testimony of Percy Newford.)

them and get all I want. The other fellow that was with him came over and talked to me and I gave him the 40 sheets and he gave me \$600.00, a \$500.00 bill and a \$100 bill. [32]

“Q. Whom did you give the sheets to?

“A. Mr. Laurent.

“Q. Who gave you the \$600?

“A. Mr. Laurent.

“Q. How many sheets did you sell him?

“A. 40 of them.

“Q. 64 to a sheet; is that correct?

“A. Yes, sir.

“Q. The 40 sheets that you sold Mr. Laurent at this time and place, Mr. Newford, from whom had you obtained those 40 sheets?

“A. Mr. Youmans.”

Referring to and examining Government's Exhibit in Evidence 3, these sheets are identical with the coupons sold by me to the defendant Laurent at this time and place. I asked him at this time and place why he came to see me when you have some other people you used to get these coupons from and he said the other people did not have any more and he came to see me as it was too late to see this other party on Pacific Street. Mr. Youmans lives on Pacific Street.

“Q. Was anything said in regard to price?

“A. Yes. I asked him how much he sells them for. I says, ‘How much do you sell them for?’ He says, ‘None less than \$35 a sheet.’ ”

(Testimony of Percy Newford.)

Cross Examination

The first time I met the defendant Laurent was in November or December. I was told there was a man by the name of Frank at a garage on Post Street and he wanted some coupons. He said the price was kind of steep and that if he could get them cheaper he would do some more business. He bought two of them for \$20 a piece. I again saw the defendant in the latter part of January or February in a Russian Tea Room and this meeting was by appointment, but the appointment was made by the other fellow who rang up about twenty minutes before nine and said he was bringing a customer who wanted to buy some coupons. I only knew the other fellow by the name of George. I met George in the card room and when George 'phoned me he said he would bring a customer. When George first came in he said this man did not want to buy as many [33] as he wanted to buy at first; that he just needed 40 and would pay \$15 a piece for each one. I walked away from him as I didn't want to do any business with him. I had coupons on my person because some other fellow was supposed to come in from George. I was not selling tickets generally, just when someone wanted them and I got them from Mr. Youmans. I don't know how many people I sold sheets to from the first of January to the end of February. I don't keep any books or records. George did not introduce me to Laurent. He said 'Hello' to me, because I seen him that once before. The defendant did not

(Testimony of Percy Newford.)

say at this conversation he was getting his coupons from Youmans. He said he was getting them from the same address I got them, on Pacific Street. He did not specify the name [34] Youmans at all.

I have pleaded guilty in this case and am now awaiting sentence. There have been no promises made to me in the matter of leniency or immunity for testifying against Laurent. Anybody would expect to try and expect a little leniency in a predicament like this. The reason I am testifying here is that when I got out of the prison cell I went home and my wife found out what had happened and asked me to make a clean breast of it and I came back and told the truth and that is all I know of it.

TESTIMONY OF ERNEST N. HART FOR THE UNITED STATES

Ernest N. Hart, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

I own a Plymouth four-door sedan and use A coupons and have not had any C coupons and have never bought any gasoline from the Post Street Garage. The number of my license is 01-G-627. No member of my family bought any gasoline for the car during January and February.

(Testimony of Ernest N. Hart.)

Cross Examination

I am the manager of the Rialto Building, New Montgomery and Mission Streets. I live at 1840 Clay Street and seldom use the car in San Francisco. No one else uses the car but myself.

TESTIMONY OF JOHN E. DUFF
FOR THE UNITED STATES

John E. Duff, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

I own a Lincoln sedan, Model 1941 and the license number is 24-B-575. I applied for and received a type A gasoline coupon book. I never had any C-2 coupons and have never purchased gasoline from 740 Post Street, San Francisco, nor did I deliver any C-2 [35] coupons to that place. My wife occasionally drives the car and she never uses a C-2 coupon.

Cross Examination

I live at 14 Shore View Avenue. My place of business is at 160 California Street and I sometimes travel on Post Street on Sunday going to the Olympic Club.

TESTIMONY OF WILLIAM IRVING SMITH
FOR THE UNITED STATES

William Irving Smith, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

I live at 502 Twentieth Avenue, own an automobile and the license number is 02-G-699. I have an A coupon. I never delivered three C-2 coupons to the Post Street Garage at 740 Post Street, nor did any member of my family.

TESTIMONY OF WILLIAM SINGER
FOR THE UNITED STATES

William Singer, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

I live at 696 Seventeenth Avenue and own an automobile whose license number is 70-A-319. I have an A coupon and have never purchased any gasoline from the Post Street Garage at 740 Post Street.

Cross Examination

I could not get gas with a C-2 coupon if I had simply an A coupon.

Redirect Examination

I never put my license number on any C-2 coupons.

(Testimony of William Singer.)

Recross Examination

Nobody uses my car except myself. My place of business is at Seventh and Market and I use a Chevrolet pick-up truck during the week, the license number of which I don't know. [36]

TESTIMONY OF BERNARD A. BEUKERS
FOR THE UNITED STATES

Bernard A. Beukers, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

I own a Chrysler sedan, license number 32 B 786. I have never purchased gasoline at 740 Post Street in my life.

Cross Examination

I live at 1417 Henry Street and my place of business is 144 Shattuck Avenue, Berkeley. No one else drives my car but my wife.

TESTIMONY OF BERT F. BISCOTTO
FOR THE UNITED STATES

Bert F. Biscotto, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

I reside at 2928 Franklin Street and own a Chevrolet sedan, license number 99 F 271. I applied for and received a type A coupon book from my Ration

(Testimony of Bert F. Biscotto.)

Board. I never bought any gasoline from the Post Street Garage.

Cross Examination

I work for the Kilpatrick's Bakery at Sixteenth and Folsom Streets. I am the only one that drives my car and never loan it and never travel along Post Street.

TESTIMONY OF FRANK CUSHERE
FOR THE UNITED STATES

Frank Cushere, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

I reside at 1880 Oakdale Avenue, San Francisco, and own a filling station. I own a 1925 Chevrolet automobile, license number 26 B 996. My ration board has issued to me a type A ration book and I have never had C-2 coupons issued to me or never purchased any gasoline at the Post Street Garage, 750 Post Street. [37]

Cross Examination

My filling station is located at 4240 Third, near Gerald and I reside at 1880 Oakdale Avenue. I do not come to this side of town much, just as far as Eleventh and Mission. I have two cars, both sedans. My wife drives the other car.

TESTIMONY OF ELEANOR B. ROSE
FOR THE UNITED STATES

Eleanor B. Rose, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

I am supervisor of the gasoline panel of Board 3, 1215 Van Ness Avenue and the Post Street Garage, 740 Post Street, is within the jurisdiction of Board 3. I know Frank Laurent of the Post Street Garage. I examined the file which is a part of the records of Board 3 relating to the Post Street Garage and I find that no C-2 coupons have ever been issued to Frank Laurent.

Cross Examination

The records do not disclose that the defendant ever applied for C-2 coupons.

TESTIMONY OF JOHN SNOW
FOR THE UNITED STATES

John Snow, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

I am a driver for the Shell Oil Company and in the course of my business I deliver gasoline to Frank Laurent of the Post Street Garage. When I deliver gasoline to a garage I receive from the garage owner or from the person at the garage coupons in exchange for the gasoline. The gallonage of the number of stamps must compare with the

(Testimony of John Snow.)

gallorage on the invoices delivered. At the end of the day, or the end of the trip, I turned these coupons and an invoice of the gasoline given to the customer to the cashier at the yard of the Shell Oil plant.

“Q. Referring to Government’s Exhibit in evidence No. 3, Mr. Snow, the same being nine sheets—— [38]

“The Court: Nine?

“Mr. Hammack: Yes, your Honor. I think think there are none there.

Referring to the two sheets dated February 10th, there are 30 coupons on one sheet and 50 on another, which would make 400 gallons. I received stamps for 400 gallons but I could not positively identify the stamps because we have no marks on the stamps. The summary I have shows eighty 5 gallon coupons, or 400 gallons and it is more than likely that these are the coupons I received in exchange for the gasoline.

“Mr. Hammack: I think perhaps we can stipulate to it, your Honor. Mr. Duane, may it be stipulated that all of the coupons contained in Government’s Exhibit No. 3, the coupons contained on the bingo sheets making up Government’s Exhibit 3, were delivered by Frank Laurent in exchange for gasoline?

“Mr. Duane: I think that is correct. The only question I want to ask, because I don’t know, is it contended that the 50 C-2 that the witness just testified to are all counterfeit stamps?

(Testimony of John Snow.)

“Mr. Hammack: No.

“Mr. Duane: That is all I wanted to know.

“The Court: The 50 C-2 are February 7th.

“Mr. Duane: And they are not counterfeit stamps?

“Mr. Hammack: Some of them are.

“Mr. Duane: I see.

“Mr. Hammack: Then the stipulation will be that it will be stipulated by and between the Government and the defendant that all of the coupons on bingo sheets, being Government's Exhibit No. 3, it is stipulated, were surrendered by the defendant Frank Laurent in exchange for gasoline, the amount of gasoline called for by coupons?

“Mr. Duane: Yes. Of course, it would be my understanding the Government received them from the bank. [39]

“Mr. Hammack: You have my assurance on that.”

Cross Examination

I don't know the hour of the day I made the delivery of gas on February 10th, because I am in that location in the morning and again not until late in the afternoon. I never make a delivery after six o'clock at night. It is a fact that during the month of February certain garages and gas stations were allotted a certain quantity of gas for the month and they could not get any more than the allotment. When he had used up his allotment I would not deliver any more gas until the time for a new allotment. I cannot tell from the summary sheets whether I made a delivery on the

(Testimony of John Snow.)

10th but I wrote that invoice on the 10th, so I made the delivery on the 10th. My hour of quitting is four o'clock in the afternoon.

TESTIMONY OF IDA ADELAÏDE OPPENHEIM FOR THE UNITED STATES

Ida Adelaide Oppenheim, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

I live at 701 Post Street and during the months of January and February 1944 I parked my car at the Post Street Garage at 740 Post Street. I know the defendant Frank Laurent; he is the owner or operator of the Post Street Garage. I had a conversation with Mr. Laurent in connection with the sale of gasoline coupons in the early part of February or the last part of January 1944, when they put gasoline on an allotment. This conversation took place in the afternoon at the garage when I went to get my car. I spoke to Mr. Laurent and wanted to get some gasoline and he said I am very sorry but I can't give it to you, they just put me on quota. In answer to the question, how am I to get gas, he said, why don't you buy a book for \$11. [40]

Cross-Examination

I answered that would be awful, because that would be black market. That was all that was said. There was no one present at that conversa-

(Testimony of Ida Adelaide Oppenheim.)
tion. The defendant did not tell me where I could buy a book and I didn't ask him. I have never had any trouble of any kind. I was storing my car there at that time.

TESTIMONY OF THOMAS B. FOSTER
FOR THE UNITED STATES

Thomas B. Foster, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

For a great many years I have been in charge of the Secret Service district and for the last six years I have been supervising agent of the Fourteenth District Secret Service, comprising California, Nevada, Arizona and the Hawaiian Islands. I have been connected with the United States Secret Service for 43 years.

During the course of my business I have made a study of counterfeit bills and documents.

"Mr. Duane: We will stipulate to the qualifications of the Captain as an expert."

I examined Government's Exhibit No. 1 for Identification, being 1258 sheets of C-2 gasoline coupons and as a result of that examination I would say that they were counterfeit.

"Mr. Duane: In view of the fact that it is conceded that this defendant did not know they were counterfeit, I don't see the necessity for that testimony.

(Testimony of Thomas B. Foster.)

“Mr. Hammack: I think it is very pertinent, your Honor.

“The Court: All right, go ahead, Captain. Mr. Duane admits that Exhibit 1 is composed of counterfeit gasoline coupons.

“Mr. Duane: Yes. If Captain Foster says that, that is enough for me, but also the prosecution concedes that this defendant had no knowledge of that fact.

“Mr. Hammack: That is enough for me. [41]

I have examined Government's Exhibit No. 3 in evidence and some of the coupons are counterfeit and other coupons are genuine. It is my opinion that the counterfeit coupons contained in Government's Exhibit No. 3 in evidence are of the same make as those contained in Government's Exhibit No. 1 for identification; that is the coupons of these bingo sheets are made by the same party as the coupons on the sheet of Government's Exhibit No. 1 for Identification.

“Mr. Hammack: At this time I will offer in evidence Government's Exhibit No. 1 for Identification and ask that it be marked Government's Exhibit next in order in evidence.

“The Court: Admitted.

“Mr. Hammack: 1258 sheets of counterfeit coupons.

“Mr. Duane: For the record, we will object on the ground it is incompetent, irrelevant, and immaterial, and not binding on the defendant on trial.

“The Court: Overruled.

(Testimony of Thomas H. Foster.)

U. S. Exhibit 1 For Identification was thereupon admitted in evidence.

“Mr. Duane: Exception.”

(Exception No. 6.)

Cross-Examination

If these C-2 coupons were seen by a layman their counterfeit character could not readily be discernible by him and I would put in the class with the layman a person engaged in the handling of those stamps, for instance, an enforcement officer of the OPA. These coupons were sent to both the Secret Service and the OPA in Washington for the purpose of ascertaining whether they were counterfeit or genuine and I was consulted and I pronounced them counterfeit.

The Government rests. [42]

“Mr. Duane: If your Honor please, I would like to make a motion, if the jury may be excused.

“The Court: Very well. Ladies and gentlemen of the jury, remember the admonition heretofore given to you by me. Will you please retire to the jury room for a few minutes.

“Mr. Duane: Now, if the Court please, we at this time interpose a motion for an advised verdict in this case, and we base the motion on three distinct propositions.”

First: There has been no proof of any conspiracy here;

Second: Nothing has been offered to establish a conspiracy;

Third: And on the admission by the Govern-

(Testimony of Thomas H. Foster.)

ment that the defendant had no knowledge that the coupons involved were counterfeited or forged.

“The Court: I suggest you submit it now and I will deny your motion, but you will have an opportunity to present it later to the Court.

“Mr. Duane: Very well, your Honor.

“The Court: The motion will be denied.

“Mr. Duane: And note an exception, your Honor.”

(Exception No. 7.)

Whereupon the following named persons were called as witnesses on behalf of the defendant, being first duly sworn, testified that they had known the defendant for a number of years and his general reputation in the community in which he lives for truth, honesty and integrity was very good, to-wit: Frank P. Kelly, Fire Marshal of the City and County of San Francisco; Kenneth Orville Plough, owner of the Plough Electric Supply Company and foreman of the grand jury of the City and County of San Francisco in 1940; Craig P. Smith, Lieutenant Commander of the United States Naval Reserve; Marvin Edwin Freeman, Assistant Manager, [43] San Francisco Branch, Chanslor & Lyon Company; Mrs. Ione Kendall, secretary in the firm of Cornwall & Banker; William Hans Schwartz, Assistant Chief Draftsman, Bethlehem Steel Company; Florence T. Lombard, owner of the Lombard and Commodore Hotels, San Francisco; Edward Victor Walsh, hotel manager; and Mrs. Thomas Otis, 745 Sloat Boulevard, San Francisco.

RAYMOND CERF,

a witness on behalf of the defendant.

Raymond Cerf, called as a witness on behalf of the defendant, being first duly sworn, testified substantially as follows:

I have been the attendant at the Post Street Garage since the first of the year and my duties are to sell gas, wash windshields, look out that people put cars away properly, look out for the elevator and answer the telephone, and receive moneys and tickets. I cannot drive cars and work from 7:30 in the morning until closing at midnight. A young lady operates the pumps, other than myself, at meal times. The defendant Frank Laurent does not operate the pumps and I have not seen him serve gas to the customers. When a customer comes in for gas I take the stamps and the cash and the customer writes the license number of the automobile on the stamp. At times I have difficulty, by reason of the lights and time of day, because of the reflection, in determining whether the license number is on the coupon.

Referring to Government's Exhibit No. 3, there are license numbers on them, some on top and some on the bottom. To my knowledge I have never sold any gasoline without receiving a stamp or coupon.

The garage closes at midnight. Mr. Laurent's duties are that of master mechanic, he repairs all cars, purchase and resale of cars and going for parts. Besides myself and Laurent, the other employees are a girl who comes in part time to relieve

(Testimony of Raymond Cerf.)

and park cars in the rush hours, and another young lady to take care of the books. [44]

Cross-Examination

I have been working for Mr. Laurent since January of this year; I work every day from 7:30 in the morning until midnight and am on duty all the time, except to eat my meals or may go out for an hour or so, if somebody is there, otherwise I don't leave the floor of the garage. I don't sell gasoline every hour; you sell in the early morning and when people are going home from work; you are not at the pumps every minute. I put the coupons for gasoline in the cash register and I don't know who puts them on the bingo sheet. If it is possible I always check the license number of the car against the coupon given but it is not always possible, because you have people in storage and they have to get to work. You take it for granted when a person comes in and gives you a ticket that it is properly licensed. I don't know how many C-2 coupons I take in in a month and I don't know how much gasoline I sell in a day.

BERNARD LANDWEER,

a witness on behalf of the defendant. Bernard Landweer, called as a witness on behalf of the defendant, being first duly sworn, testified substantially as follows:

I have been acting as local manager of the Shell

(Testimony of Bernard Landweer.)

Oil Company in San Francisco for the last five months. I am familiar with the account of the Post Street Garage, which is operated and owned by the defendant. Starting on December 1, 1943, there was a system of allotment of gasoline for garages and service stations. The allotment consists of supplying garages or service stations with a certain quantity of gasoline by the month; it is allocated by our head office and each dealer was put on a cut basis and they could probably have sold a lot more gasoline than we could supply them. During the month of December, 1943, the Post Street Garage received from my company around 4100 gallons and in November it [45] was 4700 gallons; January it was around 4000 gallons; February it was around 3900 gallons; March 3900 and April it was down to 3400 gallons. As far as I know, at the present moment there is no gas in the Post Street Garage; it was all used up. Each month Mr. Laurent and other customers would call us and ask for more gasoline as they had sold their quota and we had to tell them there was no more gas. The Post Street Garage is an average volume garage.

Cross-Examination

The business of an average garage is servicing and storing cars and they would not use as much gasoline as a service station; the average garage would sell about four or five thousand gallons a month and the average service station eight or nine thousand. Mr. Laurent had the amount of gas based on his deliveries he took during 1943.

CAMILLE A. LAURENT,

a witness on behalf of the defendant. Camille A. Laurent, called as a witness on behalf of the defendant, being first duly sworn, testified substantially as follows:

I am the sister of the defendant on trial and I work at the garage two nights, on Monday and Wednesday nights, taking care of the books. Generally I don't have anything to do with the gas coupons. If there are a few extra coupons or if Frank is rushed I put them on the sheets. I have on occasion served gas to the customers, when Mr. Cerf goes out for a breath of air. I have required gas coupons on those occasions and have also required that the license number be put on them. I have been doing this for my brother since sometime in November, 1943.

TESTIMONY OF FRANK LAURENT,
THE DEFENDANT

Frank Laurent, the defendant, called in his own behalf, having been first duly sworn, testified substantially as follows: [46]

I am the defendant here and am 32 years of age and am the owner and operator of the Post Street Garage, 470 Post Street, and have been since May 1, 1943.

I don't know, nor have I ever met a man by the name of Russell S. Youmans. I have never met a

(Testimony of Camille A. Laurent.)

man by the name of Arthur Grenier, or a man by the name of Albert Norwitt, nor a man by the name of Charles Corsiglia, nor a man by the name of Bernard R. Kerns. I understand that these names are those of the men charged as co-conspirators with me in this indictment. I know a man by the name of Percy Newford. I met him at a gambling joint on Geary and Fillmore Streets sometime the first part of February of this year. I met him under these circumstances: one night about six o'clock I was in the garage and a fellow came in to me whom I didn't know; he asked me if Frank was there and I told him I was Frank; he didn't know me. He told me he had a good deal for me in buying an automobile. He told me that a man up in the grocery store told him I owned the garage and he came to me because he knew a man who owned a car and was interested in selling it. I have since learned that the name of this man is George Allen. When he told me there was a deal in sight I went right over with him in his car to this gambling place on Geary and Fillmore Streets. We knocked on the door and Allen said I want to see Percy and the man said Percy is not here and won't be back until later this evening. Allen came back later to get me and I drove him over in one of my cars, around 11 or 11:30 at night. I met Newford in that place. I had never met him before and never knew him and had never known a name like his; that was the first time I had ever had

(Testimony of Camille A. Laurent.)

anything to do with him. He wanted to know if I wanted to buy some books he was offering at \$22.50 a piece. These were regular coupon books. He had 40 of these books. I told him I was not interested in any books whatsoever, I wouldn't have any use for books. I needed gasoline and not [47] books. He said I will give you an attractive price and you can resell them; finally came down to \$15 for the forty books, or \$600.00. I was not interested in buying or selling the books, so I told him no, but he had the forty books and wanted to sell them. Nothing was said about the purchase of a car.

Referring to Government's Exhibit No. 3, which is nine bingo sheets, there is no question but they are my coupons. They are not all counterfeit coupons, there are some marked off as genuine coupons.

On very rare occasions I serve gas at the pump, but only when Mr. Cerf was engaged in eating or doing something else and no one else was around. I will serve gas but I can't afford the time to spend at the pump. I service cars, repair them, buy and sell cars and sell insurance; that is the bulk of my business. I have to park all the cars during the day because Mr. Cerf does not drive. I have a girl who comes in late in the afternoon and works in the evening parking cars and my sister comes in two nights a week to work on the books. Sometimes I take care of twelve or fifteen repair jobs a day myself. I have about 75 steady storage customers, not counting transients. Although the ga-

(Testimony of Camille A. Laurent.)

rage can hold 135 cars the maximum capacity I will allow is 100 cars. With reference to the sale of gasoline, it is very spotty. During the morning when people go to work they get gas or when they come back from work but during the rest of the day you may not have one customer in three hours. In the morning and evening there is always a lineup at the pumps. Everybody wants gas at the same time. I sell approximately 120 gallons a day. Referring to my allotment of gasoline, this month for instance, I was out the 26th of April; the preceding month I made it last by not serving any casual customers. Lots of times people drive in who have no gasoline and you have to give them some. It is absolutely not necessary for me to give or sell [48] coupons to dispose of my gasoline.

Cross-Examination

I have about a hundred cars in my garage and I always take care of the gasoline needs of my storage customers first. I don't know how many gallons a day they use up. Referring to Government's Exhibit No. 3, I do not know whether the license numbers on there are the numbers of cars stored permanently in the garage. I am familiar with the automobiles but so far as the license numbers of a car goes I cannot tell you. I keep a record of the license numbers of the steady storage customers by the month and most of my customers have A books; there are a few in the garage with B and C-2 books. Those on Government's Exhibit No. 3 came mostly

(Testimony of Camille A. Laurent.)

from transient business. I don't take care of the gas by the number of coupons I get. I don't know how many customers I get that have C-2 coupons; it does not make any difference to me what kind of coupons they have. I may go some months and have only A coupons; I don't have any control over the kind of coupons they have.

The first time I met Allen was when he came into my garage. He didn't know me and I didn't know him. He found out I was there by asking a man in the grocery store on the corner. He wanted to know if I was interested in buying a car and he wanted to know who Frank was and I said I was and I would be interested in buying an automobile. I didn't ask him what kind of a car it was, as I never ask anybody that; I will buy any kind of a car; I didn't ask him what model it was; I didn't ask him what condition the car was in; cars are in all kinds of condition. I give a commission if I am buying a car to somebody that gives me a tip. I never asked Allen why he came to me, because I never ask that of anybody that tips me off where I can buy a car. I have strangers tell me where I can buy a car and have a big sign in front that says I am in the business of buying and selling automobiles. I told Allen I would take care of him if I bought the [49] car. Automobiles are so scarce that I will travel anywhere to find someone willing to sell an automobile. I expected Allen was to get a commission for selling the car. He didn't ask me for a commission, he asked me if I was interested

(Testimony of Camille A. Laurent.)

in buying a car. I said yes and he said come on over. I met Newford the second time I went to the Russian Tea Room. I didn't say anything to Allen when I found out Newford didn't have an automobile to sell; I just walked out of the place and told him all that fellow wants is to get me to buy some gas books and I am not buying any gas books. Allen said he didn't know what the deal was. I didn't say anything to Newford about buying a car. He came out with the gas books right away. There was no deal to buy a car from Newford at that time. I went over there under a false impression. It is hard to remember exact words; I know he came out with tickets in an envelope to sell them to me, but in buying and selling cars you tell people so many different stories about buying and selling them. I didn't buy a car then as there was no car to sell. It was all predetermined that I was going to buy an automobile. Answering your question as to what I said to Newford when he kept me up until 11:30 at night; I was up every night until midnight because of business; it is part of my business.

TESTIMONY OF GEORGE W. ALLEN,

called as a witness for the defendant. George W. Allen, called as a witness on behalf of the defendant, being first duly sworn, testified substantially as follows:

I know the defendant on trial, Frank Laurent, and

(Testimony of George W. Allen.)

have known him for a period of four or five months. I used to go to a certain Russian Tea Room on Geary Street and a man by the name of Percy said he had a car for sale. I overheard the conversation and I said I knew a fellow who bought cars and he said bring him around. I don't know whether it was the next day or several days [50] later I went to this fellow who owns a grocery store on the corner of Post and Leavenworth and while there I remembered about this incident of the man saying he wanted to sell a car, and he said I don't buy them, but there is a fellow down the street by the name of Frank who buys them. Subsequently I went to see Frank in the garage and that was the first time I met Laurent. I didn't telephone Percy at the Russian Tea Room before Frank and I went there around 8:30 or 9 o'clock, at some date in the latter part of January or first of February. Percy was not there so we came back about 11 or 11:30 and he was present. There is a little hallway there and Mr. Laurent stepped into that hallway and I went into the room and told the fellow that Frank was out there. I told the fellow that the buyer was out there for his car. I said this is the fellow that will buy your car Percy and walked back into the card room. What transactions they had I don't know.

Cross-Examination

I live at 346 Leavenworth Street, between Ellis and Eddy, and my occupation is that of bartender. The first time I went to the Russian Tea Room with

(Testimony of George W. Allen.)

Laurent was about 8 or 9 o'clock and I did not go there at 6 or 6:30. I have known Laurent about four or five months, since the latter part of January, 1944. I knew he operated a garage the first time I met him. I did not telephone to Mr. Newford at the Russian Tea Room at about 8:30 or 9 o'clock at night. I didn't tell Newford that I had a man that wanted to buy five or six thousand dollars worth of coupons. I didn't tell Newford this was big business. I didn't buy C-2 coupons from Newford. I should say I do not owe Newford for two sheets of C-2 coupons. Referring to how much I would get for selling the car, Mr. Laurent said he would take care of me and I figured the Gentleman owning the car would do so also. I do not recall the date Mr. Newford said he had a car for sale; it was one night I was out there in the card room of the club. At [51] the present time I am working four nights a week at the 39'er on Mason. Sometimes I work days and others at nights. I don't recall just what date it was that I went out to see Newford at this Russian Tea Room. I cannot place the approximate date, just four or five months ago. Four or five fellows were present around the table. I don't know any of them by name. I knew Mr. Newford would be at the Russian Tea Room the night I brought Laurent there as he said he was there practically all the time. I asked how can I locate you when I get hold of this fellow and he said I am here practically all the time, six or seven

(Testimony of George W. Allen.)

in the afternoon until midnight. I didn't know the Russian Tea Room did not open until 7:30 or 8:00 o'clock at night. I have been out there three or four times, sometimes I went late and sometimes early. I didn't get a commission for the sale of the car from Laurent as there was no transaction. Newford did not give me a commission, because there was no transaction. As to whether or not I asked for a commission from Laurent for the sale of the car, I will tell you that when we left Laurent said, this fellow has no car for sale, he wants to sell me some gas stamps. He said he was not in the market to sell gas stamps. I just laughed it off and Mr. Laurent said he would not get tangled up in a mess like that for all the tea in China. I didn't say anything to Newford about misleading me into thinking he had a car for sale. I didn't go back to talk to Newford again.

PERCY NEWFORD,

a witness previously sworn, recalled for the United States.

I know Mr. Allen who was just on the stand. I have seen him three times in the last three or four months. He is just a casual acquaintance. I met him at the Russian Tea Room about January, 1944. I am pretty sure it was before February 10, 1944 that Laurent came to meet me at the Russian Tea

(Testimony of Percy Newford.)

Room; Allen brought him. I knew Allen just by the name of George. Allen [52] 'phoned me 20 minutes to 9:00 exactly and asked me if I was going to be there for a while. They came out at ten after nine. I was playing pinoche and *and* Allen said first he was coming out to buy \$5,000 or \$10,000 worth if I would have that many books. When he came out he said he only wanted about 40. He called me from the table to the hallway where Mr. Laurent was. Laurent was the one who suggested about the 40 books. I sold him the 40 books 64 coupons to the book. I have a Studebaker car. I never told Allen or anyone else I was in the market to sell the car. I use the car to haul riders to the different piers. On February 10, 1944 Laurent did not ask me I had a car for sale; he never suggested a car to me at all. I have offered no one my car.

Cross-Examination

Concerning when I had this discussion with Laurent about buying \$5,000 or \$10,000 worth of stamps, two or three times George Allen rang up by 'phone. He came out first with a fellow by the name of Walter. They came out to buy a few coupons for themselves, but said they had a deal to \$5,000 or \$10,000 worth.

Mr. Hammack: Q. Now, when did Allen say to you or when did Laurent say to you, if either one said it, that Laurent would buy \$5,000 or \$10,000 worth of stamps?

A. This gentleman, all the way in from the latter end of January into February.

(Testimony of Percy Newford.)

I recall that I testified yesterday that Laurent wanted to buy stamps and I said I was not interested. I recall that there was a further conversation and that I finally sold him 40 sheets for \$600.00. I didn't say anything yesterday about a conversation for the purpose of buying \$5,000 or \$10,000 worth of coupons. I remembered it yesterday but no one asked me. I did not know it was Mr. Laurent that was going to get the coupons. I know it now. I never knew that gentleman before until I seen him face to face; he said he had big business and brought Mr. Laurent in and I concluded he must be the one. He came in with [53] a fellow by the name of Walter the first time and then came in by himself twice. This fellow Walter come in and asked me about some books. In between the conversation with Walter he gave me \$108 for eight books. That was sometime the end of January. The first time he walked in was the 30th of January. I have been selling those books since January 22nd. I had a few of the other ones from October, 1943, and was selling them from about October 1, 1943.

FRANK BRUSH;

a witness previously sworn, recalled for the United States.

Referring to Government's Exhibit No. 3 in evidence, there are nine sheets, and 387 coupons and of the 387 there are 325 counterfeit coupons.

(Testimony of Frank Brush.)

“The Court: Do you wish to introduce in evidence the currency, \$10,482?”

“Mr. Hammack: Yes, your Honor, I will introduce that in evidence at this time.

“The Court: Admitted.”

(U. S. Exhibit 2 for Identification was thereupon admitted in evidence.)

“Mr. Duane: At this time, if the Court please, I want to move to strike out the testimony of the witness Brush that has to do with his transactions or his activities as respects the man Youmans, on the ground that it is incompetent, irrelevant, and immaterial. It is hearsay and not binding on the defendant in this case.

“The Court: Denied.

“Mr. Duane: Exception.”

(Exception No. 8.)

“Mr. Duane: If the Court please, I desire at this time to move the Court for a directed verdict in this case, and I am perfectly [54] willing to make the motion in the presence of the jury.

“The Court: Well, just state the grounds of your motion.

“Mr. Duane: First, that no conspiracy has been established. Second, that the indictment charges or attempts to charge an offense which in fact is no offense and no violation against the law of the United States. And, third, any transaction between Newford and Laurent would not be an overt act in furtherance of an alleged conspiracy.

“The Court: Denied.

Mr. Duane: Exception.”

(Exception No. 9.)

Thereupon the Court instructed the jury.

At 12:05 P.M. the jury retired to the jury room; at 2:37 o'clock P.M. the jury returned to the court room and the following proceedings were had:

“The Court: I have received a request from the jury which reads as follows: ‘Jurors wish the Court’s definition of what constitutes conspiracy.’

“I will read to you what I read as a part of my instructions.”

Thereupon the jury retired to deliberate upon its verdict. The jury returned into Court and upon being asked if it had agreed upon a verdict answered that it had and the foreman presented to the Court the verdict as follows: “We, the jury, find Frank Laurent, the defendant at the bar, guilty.” Signed by the Foreman.

Thereafter, and on the 4th day of May, 1944, counsel for the defendant moved the Court for a new trial, which said motion for a new trial was as follows:

“Now comes the defendant, Frank Laurent, in the above entitled action and moves this Honorable Court for an order vacating the verdict of the jury convicting him and granting him a new trial on the indictment herein, [55] for the following and each of the following causes, materially affecting the constitutional rights of said defendant:

1. That the verdict is contrary to the evidence adduced at the trial herein;

2. That the verdict is not supported by the evidence in the cause;

3. That the evidence adduced at the trial is insufficient to justify said verdict;

4. That the verdict is contrary to law;

5. That the trial court erred in admitting evidence in the course of the trial, which was incompetent, irrelevant and immaterial, which errors were duly and regularly excepted to by the defendant;

6. That the trial court erred in refusing to direct a verdict of not guilty at the close of the evidence of the United States;

7. That the trial court erred in refusing to strike out certain testimony which was incompetent, irrelevant, immaterial and hearsay;

8. That the trial court erred in refusing to direct a verdict of not guilty at the close of all of the evidence;

9. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid.

This motion is made upon the minutes of the court and upon all records and proceedings in said action and upon all of the testimony and evidence introduced at the trial.

Dated: May 4th, 1944.

WALTER H. DUANE

Attorney for Defendant [56]

Said motion for a new trial was by the Court denied, to the denial of which the defendant duly excepted.

(Exception No. 10.)

Thereafter counsel for the defendant moved the court in arrest of judgment, which motion in arrest of judgment is as follows:

“Now comes, Frank Laurent, the defendant in the above entitled action, against whom a verdict of guilty was rendered on the 3rd day of May, 1944, in the above entitled cause and moves the Court to arrest the judgment against him and hold for naught the verdict of guilty rendered against him.

1. That the indictment does not state facts sufficient to constitute a public offense under the laws of the United States;

2. That the evidence is not sufficient to support the verdict;

3. That the verdict of the jury is contrary to law.

Wherefore because of which said errors in the record herein, no lawful judgment may be rendered by the Court and the defendant prays that this motion be sustained and the judgment of conviction against him be arrested and held for naught, and that said defendant have all such other orders as may seem meet and just in the premises.

Dated: May 4, 1944.

WALTER H. DUANE

Attorney for Defendant.”

Which said motion in arrest of judgment was by the Court denied, to the denial of which the defendant duly and regularly excepted.

(Exception No. 11.) [57]

Said motions for a new trial and in arrest of judgment having been denied, the Court proceeded to pass judgment, and thereafter on May 4, 1944, the Court imposed judgment and sentence on the defendant as follows:

“It is ordered that the defendant Frank Laurent be committed to a term of imprisonment in a United States Penitentiary, to be designated by the Attorney General of the United States, for a term of two years and to pay a fine of \$5,000.00.”

That the above Bill of Exceptions contains all of the evidence, oral and documentary, and all of the proceedings relating to the trial, conviction, motion for a new trial, motion in arrest of judgment and judgment and sentence.

Dated: San Francisco, California, June 15th, 1944.

WALTER H. DUANE

Attorney for Defendant and
Appellant

[Endorsed]: Filed Jul. 12, 1944. C. W. Calbreath, Clerk. [58]

[Title of District Court and Cause.]

STIPULATION RE: BILL OF EXCEPTIONS

It Is Hereby Stipulated by and between the attorneys for the United States and the attorney for the defendant that the foregoing Bill of Exceptions on behalf of the above named defendant on appeal

herein to the Circuit Court of Appeals in and for the Ninth Circuit is in proper form and conforms to the truth and that the same may be settled, allowed, signed and authenticated by this Court as the true Bill of Exceptions herein on behalf of said defendant and that it may be made part of the record in this case.

FRANK J. HENNESSY

United States Attorney

By REYNOLD H. COLVIN

Assistant United States At-
torney

WALTER H. DUANE

Attorney for Defendant and
Appellant [59]

[Title of District Court and Cause.]

ORDER SETTLING, ALLOWING AND AU-
THENTICATING BILL OF EXCEPTIONS
AND MAKING THE SAME PART OF THE
RECORD

The foregoing Bill of Exceptions duly presented by the defendant Frank Laurent and duly agreed to by the respective parties hereto, having been duly presented to the Court within the time allowed and required by law, as extended, and by the rules and orders of this Court, duly and regularly made in that behalf, is hereby settled, allowed, signed and authenticated as in proper form and in conformity with the truth and as the true Bill of Exceptions herein and is hereby made a part of the record in this case.

Dated: July 11th, 1944.

A. F. ST. SURE

United States District Judge

[60]

District Court of the United States

Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 60 pages, numbering from 1 to 60, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of The United States of America vs. Frank Laurent No. 28385 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.80 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 21st day of August, A. D. 1944.

[Seal]

C. W. CALBREATH,

Clerk

By E. VAN BUREN

Deputy Clerk [61]

At a Stated Term to wit: The October Term 1943, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the thirteenth day of June in the year of our Lord one thousand nine hundred and forty-four.

Present:

Honorable Curtis D. Wilbur, Senior Circuit
Judge, Presiding,

Honorable Francis A. Garrecht, Circuit Judge,
Honorable William Healy, Circuit Judge.

No. 10773

FRANK LAURENT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME FOR APPELLANT
TO LODGE PROPOSED BILL OF EX-
CEPTIONS

Upon consideration of the application of the appellant supported by affidavit of Mr. Walter H. Duane, counsel for appellant, and good cause therefor appearing,

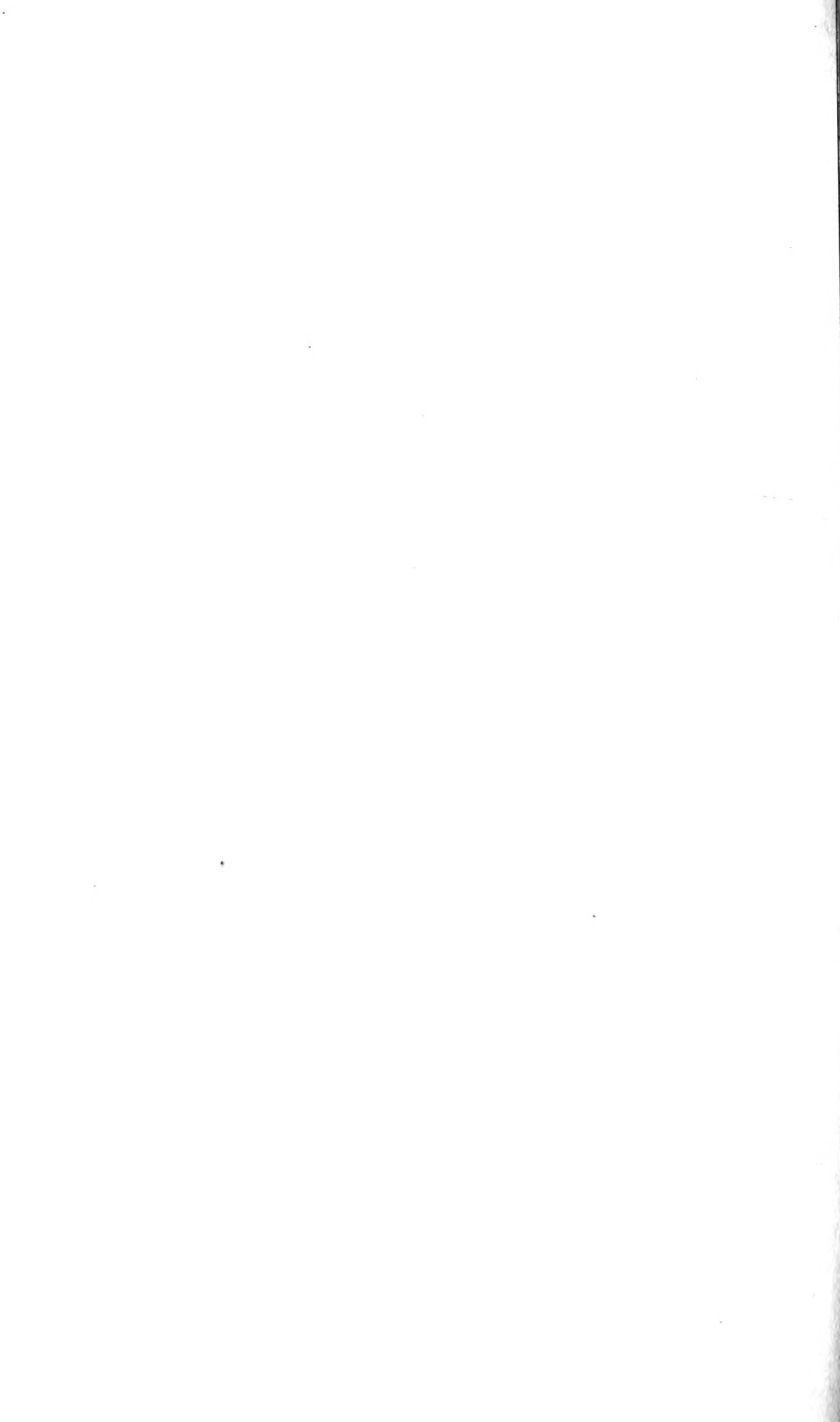
It is Ordered that the time within which appellant may lodge his proposed bill of exceptions in this cause with the clerk of the trial court be, and hereby is extended to and including June 17, 1944.

[Endorsed]: No. 10773. United States Circuit Court of Appeals for the Ninth Circuit. Frank Laurent, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California Southern Division.

Filed August 28, 1944.

PAUL P. O'BRIEN

Clerk for the United States Circuit Court of Appeals for the Ninth Circuit.



No. 10,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK LAURENT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S CLOSING BRIEF.

WALTER H. DUANE,

Mills Building, San Francisco 4, California,

Attorney for Appellant.

FILED

FEB 23 1944

PAUL P. O'BRIEN,
CLERK



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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK LAURENT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S CLOSING BRIEF.

APPELLEE FAILS TO ESTABLISH CONSPIRACY.

Nowhere in the brief of appellee is there substantial argument to support the contention that a conspiracy is established in this case, other than the observation contained in appellee's argument on page 14 of its brief, wherein appellee recalls "that the indictment charged all of the persons named therein with conspiracy * * *". We will not take the time of the court to argue the proposition that the indictment is not evidence in the case.

Much stress is laid upon the testimony of the witness Newford, upon whom the prosecution relied to a great extent, and who obviously would be thoroughly conversant with all of the facts and could undoubtedly establish the existence of a conspiracy, if there had

been one, and the participation therein on the part of appellant, had he been a party thereto. But no testimony was elicited from Newford that in any way touched upon the question of the conspiracy. The nearest approach to the subject was Newford's testimony that the appellant stated to him that he, the appellant, could secure gas coupons from the same source from which he, Newford, secured them, which testimony, if true, does not tend to establish a conspiracy.

Appellant contends that, for the purposes of argument, accepting the prosecution's evidence as true in view of the jury's verdict, nevertheless the most that can be claimed for it is that it discloses that the appellant unlawfully purchased illegal gas ration coupons, or in other words, was guilty of the substantive offense of acquiring such coupons. Consider the evidence in any light desired, there is an absolute failure to sustain the charge of conspiracy to acquire, own and/or distribute such gas coupons on the part of appellant. There is no evidence that appellant knew of any conspiracy or the purposes thereof, or the means of executing such purposes, or the parties thereto. There was no long continued, or any, association between appellant and the other parties; nor is there any evidence that appellant was advised that he was considered to be acting in consonance with anyone else to consummate their purposes. At the most there is evidence, if believed—and it must be remembered that all of this evidence was denied by appellant and his witnesses—of two disconnected purchases of gas ration coupons by appellant, and that is all. There is

no evidence that he distributed such gas coupons to others or sold gasoline on the strength of such coupons to others. In fact, the evidence shows that he did no such thing. There were seven alleged license numbers upon his sheets relating to real cars and persons and the prosecution's evidence shows that all of the owners of such cars, as prosecution witnesses, denied that they had used such coupons or that they had ever dealt with appellant. (Appellee's Brief, pages 10-11.) That disposes of the real car owners and the only real third persons mentioned, and also of the prosecution's contention that appellant had used the coupons to obtain illegally gas for parties known or unknown, or had distributed them to parties known or unknown, because the prosecution admits that the remainder of the coupons referred to are fictitious license numbers. Therefore, the only use appellant made of the coupons, taking the prosecution's evidence at face value, although denied by appellant, was to obtain gasoline for appellant himself, without any agreement or understanding with anyone else that appellant in so doing was carrying out a conspiracy scheme or effectuating the purpose of any other person than himself; or, as appellee says: "The coupons appearing on the bingo sheets had been turned in by appellant to distributors for replenishment of gasoline sold." (Appellee's Brief, pages 9 and 15.) This admission and evidence of the prosecution, if true, sustained only the substantive offense of unlawful purchase by appellant, and not conspiracy to circulate or use for circulation or distribute such coupons or gasoline to parties either known or unknown.

COMPLETE CREDENCE TO APPELLEE'S EVIDENCE
FAILS OF PROOF.

If the prosecution's evidence is believed it may be that all the parties are guilty of the substantive offenses mentioned on pages 14 and 15 of appellee's brief, but there is no evidence that appellant was a party to any conspiracy to commit those offenses, or even knew of such combination or conspiracy.

Appellee concedes that there cannot be a conspiracy between a seller and a buyer of contraband goods, but attempts to evade the issue by arguing that, "as established in this case, the contraband was counterfeit 'C-2' gasoline coupons, unlawfully acquired, possessed and distributed by appellant" and further that "Appellant purchased the same for the purpose of continuing to violate the law in *distributing* and in using the same unlawfully in the *sale* and acquisition of the gasoline". (Appellee's Brief, page 16.)

Again appellee says that the defendants were charged, among other things, "with the intent and for the purpose of *enabling other persons* to the Grand Jury unknown to unlawfully obtain a rationed commodity, * * * by the use and transfer of said coupons". Appellee's Brief, page 18.) This statement might be of some effect if the evidence sustained such a charge, but the evidence, if believed, and the admission of appellee, as above set forth, demonstrates that the appellant did not distribute said coupons and did not use them or transfer them so as to permit persons known or unknown to obtain gasoline illegally, but, at most, used them to obtain gasoline for himself, with-

out any agreement or understanding with anyone that he was furthering a scheme to said effect, which eliminates and destroys any contention of conspiracy, and brings one back to the substantive offense of illegally purchasing and using gas coupons for one's own personal use and purposes, if the prosecution's evidence, although denied, is to be believed.

The cases cited by appellee in nowise attempt to overrule or change the holding and decision of the *Falcone* case, 311 U. S. 204, relied upon by appellant.

The *Direct Sales Company* case, 319 U. S. 703, cited on page 18 et seq. of appellee's brief, does not depart from the doctrine that to prove conspiracy there must be proof of knowledge of the conspiracy and cooperation on the part of the person, in order to make him a party thereto, even in cases dealing with restricted use goods. The case merely holds that under the facts proven, both by reason of the defendant having been fully advised by the Government that his purchaser intended to use the narcotics for illegal purposes before the sales had been made, and from the further fact that the quantity of the purchases of the restricted article, such as narcotics, would indicate to a reasonable person that the article was not being used for legal purposes, and in view of the further fact of the *long cooperation between the defendant and the guilty doctor, the other party to the conspiracy*, the court could well raise the inference of a knowledge on the part of the defendant that the goods were to be used for unlawful purposes and that the defendant intended to cooperate therein; but the court did not

hold that the mere use of a restricted article was of and in itself sufficient to prove conspiracy. The doctrine of the *Direct Sales Company* case sufficiently appears in the following excerpts:

The court said at page 709:

“That decision (Falcone case) comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from the knowledge that the buyer will use the goods illegally.”

Again, with relation to participation in conspiracy, the court said at page 713:

“When the evidence disclosed such a system (selling restricted goods in large quantities), working in *prolonged* cooperation with a physician’s unlawful purposes to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is uniform and interested cooperation, stimulation, instigation. And there is also a ‘stake in the venture’, which, even if it may not be essential, is not irrelevant to the question of conspiracy. Petitioner’s stake in him was in making the profits which it knew to come only from its encouragement of Tate’s illicit operations.”

None of the above factors are present in the case before the court. There is no long association between appellant and any of the other parties mentioned herein. There were no stakes to be gained by appellant's becoming a party to the conspiracy. There is no evidence of knowledge that appellant knew there was any conspiracy among any of the parties, or that he was supposed to be a member of any such conspiracy. Nor is there any evidence as to the objects or purposes of any such conspiracy or that appellant knew of any such, or that appellant was aiding or co-operating therein, and there is no evidence that appellant sold the coupons or any gasoline to third persons by virtue thereof; nor is there any evidence that appellant circulated or distributed such coupons to other persons, as appellee charges in its brief, as above pointed out. The license numbers of the real cars applied to owners who all denied that they had received any such coupons from appellant or had made any such purchases of gasoline from appellant. The other license numbers on appellant's bingo sheets were, as appellee admits, fictitious. The only use appellant made of such coupons, if the Government's evidence is to be believed—and which was denied by appellant—was to permit appellant to supply himself with gasoline. This is according to the Government's own case. So if the Government's evidence is to receive credence, all that appears is that defendant purchased the coupons for his own use; that he did not circulate them or distribute them; that he did use them to supply himself with his own gasoline; that he did not deliver them to other persons, nor did he sell

gasoline to other persons on the strength of such coupons. Therefore, as we have contended, the evidence does not show any conspiracy, but at most, if believed, shows that appellant purchased illegally certain gas coupons, which is not the charge upon which he was prosecuted.

The other case cited by appellee, to-wit: *United States v. Bruno*, 105 Fed. (2d) 921 (Appellee's Brief, pages 20-21), in nowise changes or seeks to change the holding of the *Falcone* case, but holds that, as to the defendant as to whom the judgment was affirmed, there was sufficient evidence of knowledge and co-operation. But even with this conclusion, the court nevertheless further determined that the other defendant had not been proven to be a member of the conspiracy, although he had received money orders aggregating \$6800.00 from a number of the Louisiana retailers who were members of the conspiracy, and, although the court believed that the defendant was a criminal and most probably was a member of the conspiracy because, as the court put it, the Government had failed to prove that such money orders represented the proceeds of sales of narcotics, and without this element of proof the Government had not proven participation by this particular defendant in the conspiracy and accordingly reversed the judgment as to him.

The doctrine of the *Falcone* case was recently reaffirmed in August, 1943, with relation to stolen gas coupons. The case held that where a person bought stolen gasoline coupons he could not be held on a conspiracy charge to steal the books and to receive them

with intent to convert them, knowing them to be stolen, where there was no evidence to connect the defendant with the original theft by the two original defendants, or with any of the defendants who had pleaded guilty.

The court said:

“That might have been true if, when Zuli bought the books, he had been told of the scheme to steal and later to sell them, and had agreed to buy them in order to further the scheme. But that was not the situation; although he knew them to be stolen, he bought them without any purpose of securing to the thieves the fruits of their theft. The venture, so far as he was concerned, began as it ended—with the purchase.”

U. S. v. Zuli, 137 Fed. (2d) 845, August, 1943.

We respectfully submit that the last cited case is in principle directly in point and conclusively establishes that the evidence in the case at bar is not sufficient to sustain a charge of conspiracy.

CONCLUSION.

We respectfully submit that the evidence is wholly insufficient to support appellant's conviction and that the judgment of conviction should be reversed.

Dated, San Francisco, California,
February 23, 1945.

Respectfully submitted,

WALTER H. DUANE,

Attorney for Appellant.



No. 10,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK LAURENT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 10,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK LAURENT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

The trial court had jurisdiction under an indictment, charging a conspiracy to commit offenses against the United States of America, to-wit: violations of the Second War Power Act. (Title 50 U. S. C.A., Section 633.)

STATEMENT OF CASE.

Frank Laurent, the appellant, with six other persons, was indicted by the Grand Jury for the Northern District of California, Southern Division, on the first day of March, 1944. All of the persons indicted, with the exception of the appellant, pleaded guilty. The appellant having pleaded not guilty went to trial on the 2nd day of May, 1944, in the Southern Division

of the United States District Court for the Northern District of California, and was by the jury convicted on the 3rd day of May, 1944, and was sentenced to serve a term of two years in a penitentiary and to pay a fine of \$5,000.00. (Tr. R. pp. 15-16.)

Appellant moved the trial court for a directed verdict of not guilty at the conclusion of the Government's case, which motion was denied. (Tr. R. pp. 47-48.)

Appellant moved the trial court for a directed verdict of not guilty at the conclusion of all of the evidence in the case, which motion was denied. (Tr. R. pp. 63-64.)

Appellant moved the trial court for a new trial upon various grounds, amongst which were that the verdict is contrary to the evidence; that the verdict is not supported by the evidence; and that the evidence adduced at the trial is insufficient to justify the verdict. (Tr. R. pp. 64-65.)

Appellant moved the court in arrest of judgment upon various grounds, including that the evidence was insufficient to support the verdict and that the evidence was contrary to law, which motion was denied. (Tr. R. p. 66.)

The assignment of errors was filed by appellant within the time set by the trial court. (Tr. R. pp. 19, 20, 21, 22 and 23.) The bill of exceptions was settled and allowed by the court within the time fixed by the trial court. (Tr. R. pp. 68-69.)

SUMMARY OF THE EVIDENCE.

The appellant, who is engaged in the garage business, at 740 Post Street in the City and County of San Francisco, was at all times referred to in the indictment as engaged in the retail sale of gasoline to the general public, in connection with his garage business.

On the 16th day of February, 1944, an investigator for the Office of Price Administration went to the home of Russell Youmans, named in the indictment in this case as a defendant, where the said agent took from Youmans a quantity of C-2 gasoline coupons, which were counterfeit, and also \$10,472.00 cash, lawful money of the United States. (Tr. R. p. 26.) That on or about the 10th day of February, 1944, **Percy Newford**, also named in the indictment as a defendant and co-conspirator, while playing cards in a Russian Tea Room on Geary Street, received a telephone call from an acquaintance by the name of George Allen, who stated that he, Allen, had a customer for him, Newford. That shortly thereafter the said Allen and appellant appeared at the Russian Tea Room and, according to the testimony of Newford, appellant said that he desired to purchase from Newford C-2 gasoline coupons and that Newford responded that he did not want to have anything to do with it, but after further conversation took from his person forty sheets of C-2 gasoline coupons, which he gave to the appellant and for which appellant paid Newford \$600.00. Newford further testified that the C-2 coupons which

he sold to Laurent were received by him from his co-defendant Youmans. (Tr. R. pp. 33-34-35-36.)

While it was established that the coupons referred to were counterfeit, it is conceded by the Government, and in fact was proven by Government witnesses, that appellant did not know of their counterfeit character (Tr. R. p. 46) and, while it was shown that many of the C-2 coupons returned by appellant for gasoline sold were similar to those obtained from Newford, Newford further testified that he sold similar coupons to other persons. (Tr. R. p. 35.)

It was established that appellant, like other persons engaged in the sale of gasoline, was allotted a limited quantity of gasoline each month and that the demand of purchasers was far greater than his supply. (Tr. R. p. 55.) It was further established that appellant neither before nor after the finding of the indictment in this case knew, met or talked with any of the defendants, save and except the defendant Newford, as above related. (Tr. R. pp. 52-53.)

The appellant testified unequivocally that he never purchased gasoline coupons from Newford; that he did meet Newford at the Russian Tea Room and was taken to the Russian Tea Room by one George Allen, who told him that Newford had an automobile for sale and appellant, being a dealer in used cars, was interested. That this incident was on or about the 10th day of February, 1944; that he had never therefore met George Allen; that Allen walked into appellant's garage and asked for "Frank" and appel-

lant said "I am Frank"; that Allen thereupon asked the appellant if he was interested in purchasing a used car. When appellant replied in the affirmative, Allen stated that he would introduce him, the appellant, to the man who desired to sell the car. Allen thereupon asked appellant to accompany him to the Russian Tea Room; Newford was not present when they called and they returned later on the same day, when appellant was introduced to Newford by Allen. (Tr. R. pp. 52-53.) All of the foregoing testimony was corroborated by Allen, who, after introducing the parties, removed himself from their presence. (Tr. R. pp. 57-58.) Appellant states that Newford thereupon made no mention of a desire to sell his automobile, but did solicit appellant to purchase gasoline coupons from him, Newford, but appellant told Newford that he had no need for coupons for the reason that he did not have sufficient gasoline to supply the demands made upon him and that there was no transaction between them. (Tr. R. p. 54.)

George W. Allen testified that he was a frequenter of a Russian Tea Room on Geary Street in San Francisco, where he became acquainted with Percy Newford, who said that he had an automobile for sale and that he told Newford that he knew a man who might be interested in purchasing his car. He, Allen, thereafter made inquiry of a grocer who operates a store on the corner of Post and Leavenworth Streets, where he, Allen, traded; that he related to the grocer that he had an automobile for sale and the grocer directed

him to "Frank" who operates the Post Street Garage; that he, Allen, thereupon entered the Post Street Garage and approached appellant and stated he wanted to see "Frank". (Tr. R. pp. 57-58.) Appellant stated that he was Frank and Allen thereupon told him that he represented the owner of an automobile who desired to sell a car and asked appellant if he was interested and appellant thereupon replied in the affirmative and the visits to the Russian Tea Room and the meeting with Newford were testified to by Allen, as above set forth in the testimony of appellant.

Several persons were called to the witness stand who claimed to be owners of automobiles whose license numbers were identical with those appearing on some of the gasoline coupons appearing on the sales records of appellant and in each instance said witnesses testified that they had not purchased gasoline in the establishment of appellant. (Tr. R. pp. 36-37-38-39-40-41.)

Captain Thomas B. Foster, for many years in charge of the United States Secret Service District and for the last six years Supervising Agent of the Fourteenth District of the Secret Service, testified that he made an examination of the C-2 gasoline coupons in evidence in this case to ascertain whether they were genuine or counterfeit and he found that some of them were counterfeit and others were genuine. (Tr. R. pp. 45-46.) However, the witness further testified that their counterfeit character was not readily discernible by a layman and as a matter of

fact an enforcement officer of the OPA that handled such stamps would not readily know them to be counterfeit. (Tr. R. p. 46.)

SPECIFICATIONS OF ERRORS RELIED UPON.

It is the contention of appellant that the trial court erred in admitting the testimony of the witness Frank Brush, who testified that on the 16th of February, 1944, he visited the home of Russell Youmans and there secured 1258 sheets of C-2 gasoline coupons, as well as \$10,472.00 in cash. Appellant was not present at this meeting between Brush and Youmans, nor was any evidence offered to establish the existence of a conspiracy at that time. Notwithstanding that the testimony of the witness and the exhibits, being 1 and 2, respectively, were hearsay and in no way binding upon appellant, they were admitted over appellant's objection.

We submit that the trial court erred in denying appellant's motion to strike the testimony of the witness Brush at the conclusion of the Government's case, said testimony being purely hearsay and not binding upon the defendant, no conspiracy having been established.

We hold that the trial court erred in denying appellant's motion for an advised verdict at the conclusion of the Government's case, for the reason that no evidence of a conspiracy was introduced during

the course of the trial. All that can be said in this regard is that a man by the name of Youmans had in his possession counterfeit C-2 gasoline coupons; that a man by the name of Newford had similar coupons, which he claimed he obtained from Youmans and some of which he, Newford, claimed that he sold to appellant, as well as to other persons.

If the testimony of Newford is accepted as true, it is obvious that appellant was not a party to a conspiracy, for Newford claims that when appellant sought to purchase the coupons Newford declined to deal with him, but that upon further urging upon the part of appellant, yielded to appellant's persuasions and sold him forty sheets of coupons.

We further contend that if the testimony of the witness Newford is accepted as true, appellant would be guilty of the substantive offense but not of conspiracy.

It is well settled that the elements of a criminal conspiracy are a combination or agreement by two or more persons to commit some offense against the United States and an overt act for the purpose of effecting the object of the conspiracy committed by one of the parties to the agreement or combination. In other words, there must first be an agreement between the parties—a unity of design and purpose to commit some offense against the United States. Such agreement having been completed, it is then necessary that some overt act, whether of itself lawful or un-

lawful, must be done in furtherance of the agreement or conspiracy and to effect the object thereof by one of the parties to the conspiracy or agreement.

U. S. v. Olmstead, 5 Fed. (2d) 721;

U. S. v. Munday, 186 Fed. 375.

While unquestionably the agreement or conspiracy may be established by circumstantial evidence, we submit that no evidence, whether direct or circumstantial, was offered, nor was any attempt made in the trial of this case to establish a conspiracy.

The evidence upon which appellant was convicted is essentially as follows:

Certain C-2 gasoline coupons and a substantial amount of cash was taken from Youmans, named as a co-conspirator. Newford, also a co-conspirator, sold C-2 gasoline coupons, similar to those taken from Youmans, to appellant. Newford secured the C-2 gasoline coupons that he sold to appellant from Youmans, whether he paid Youmans or not the record does not disclose. Before the purported sale, however, from Newford to appellant, it appears that an intermediary, to-wit, Allen, paved the way for a meeting between Newford and appellant and that upon appellant's solicitation to purchase, Newford declined to deal with him. We respectfully submit that not only does this evidence fail to establish appellant as a party to the conspiracy, but to the contrary tends to establish that he was not a party to the conspiracy, but rather one of many persons to whom Newford admits selling such coupons.

Nothing was offered to establish that a conspiracy existed; that any of the persons named in the indictment had entered into a combination or agreement, other than that which might be gathered from the opening statement of the prosecutor and the averments of the indictment itself, which are not evidence.

“The scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment.”

Terry v. U. S., 7 Fed. (2d) 28;

Ford v. U. S., 10 Fed. (2d) 339.

And further quoting from *Terry v. U. S.*, supra:

“A conspiracy is not an omnibus charge, under which you can prove anything or everything and convict all the sins of a lifetime.”

And in another case, decided in 1937, this Court said:

“On the other hand, an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joined in the agreement.”

Marino v. U. S., 91 Fed. (2d) 691 at 695.

To establish a case of conspiracy to commit an offense against the United States, where one or more of the parties do any act to effect the object of the conspiracy, the conspirator must himself do the act or authorize it to be done.

U. S. v. McClarty, 191 Fed. 518.

NO OVERT ACT WAS COMMITTED.

Appellant being accused as a co-conspirator with Newford, the sale of coupons by Newford to appellant and the purchase by appellant of coupons from Newford of necessity cannot be considered an overt act.

It is well settled law that where a conspiracy exists an overt act by one of the parties thereto becomes the act of all and such being the case and Youmans and Newford and appellant being co-conspirators, the act of selling by Newford was the act of selling by appellant and the act of purchase by appellant was the act of purchase by Newford, and, obviously, appellant could not buy and sell to himself and such action by the co-conspirators was, therefore, not an overt act.

In *U. S. v. Sager*, 49 Fed. (2d) 725, several defendants were indicted for conspiring to offer and give a bribe to a juror and the court said at page 727:

“This count alleges concert between several intended givers of a bribe and the intended taker of the same bribe. This concert of givers and plurality of agents are necessary elements in the substantive offense of agreeing to receive a bribe and of agreeing to give one. Where concert is necessary to an offense, conspiracy does not lie. There may not be a conspiracy founded on a crime to commit bribery between persons, one charged with the intended taking and several charged with giving the same bribe. Concert is always necessary to an agreement to take and to give a bribe; it is always necessary to an intended taking and an intended giving; and it is necessary to the receipt of a bribe and the giving of a bribe. *United States v. Dietrich*, 126 F. 664, 667 (C. C. Dist.

Neb.); *United States v. N. Y. Central R.R.*, 146 F. 298 (C. C. S. D. N. Y.) In the *Dietrich* case, Judge Van Devanter said: ‘Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses, defined in section 1781, of agreeing to receive a bribe and of agreeing to give one. A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of agreeing, receiving, or giving. In this respect, agreeing to receive a bribe from another and agreeing to give one are unlike soliciting or offering a bribe, because the solicitation or offer may be the act of a single person and may occur without any concurrent act of another. The rule stated by Wharton (2 Cr. L. No. 1339) is applicable here.’ ”

And Mr. Justice Stone declared:

“An indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity.”

U. S. v. Katz, 271 U. S. 354, 46 S. Ct. 513, 70 L. Ed. 986.

“It is well recognized that, in a crime such as bribery, where the participation of at least two persons is necessary and concert of action is essential to the offense, an indictment will not lie charging a conspiracy to commit such offense.”

U. S. v. Burke, 221 Fed. 1014-1015.

In *U. S. v. Peoni*, 100 Fed. (2d) 401, the facts briefly are as follows: The defendant was charged with conspiring to possess counterfeit money. The defend-

ant sold counterfeit bills to one Regno and Regno sold the same bills to one Dorsey. All of the parties knew that the bills were counterfeit. Peoni, having been convicted, appealed to the United States Circuit Court of Appeals for the Second Circuit and in reversing the conviction Mr. Justice Hand said:

“Assuming that Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say that Peoni agreed that Dorsey should have them from Regno. Peoni knew that somebody besides Regno might get them, but a conspiracy also imports a concert of purpose, and again Peoni had no concern with the bills for Ragno paid for them. At times it seemed to be supposed that, once some kind of a criminal concert is established, all parties are liable for everything any one of the original participants does, and even with what those do who join later. Nothing could be more untrue. Nobody is liable for conspiracy except for the fair import of the concerted purpose or agreement as he understands it.”

Finally we cite the following:

“Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government’s conspiracy dragnet if they had no knowledge that there was a conspiracy.”

U. S. v. Falcone, 311 U. S. 204, 85 L. Ed. 128.

CONCLUSION.

We respectfully submit that the evidence is wholly insufficient to support appellant's conviction and that the judgment of conviction should be reversed.

Dated, San Francisco, California,
November 8, 1944.

Respectfully submitted,

WALTER H. DUANE,

Attorney for Appellant.

No. 10,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK LAURENT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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No. 10,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK LAURENT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

This is an appeal from a judgment and order made by the United States District Court for the Southern Division of the Northern District of California, sentencing appellant on an indictment containing one count, following appellant's conviction on the same, to serve two years, and in addition thereto, to pay a fine in the sum of \$5000.00.

The indictment in this case names seven defendants, all of whom, with the exception of appellant, pleaded guilty.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the trial Court by 28 U.S.C.A., Section 41 (2), and upon this Court by 28 U.S.C.A., Section 225.

THE INDICTMENT.**“IN THE SOUTHERN DIVISION OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA**

(Title 18 U.S.C.A. 88)

In the November, 1943 term of said Division of said District Court, the Grand Jurors thereof, upon their oaths present: THAT

RUSSELL S. YOUMANS,
PERCY NEWFORD,
ARTHUR GRENIER,
ALBERT NORWITT,
FRANK LAURENT,
CHARLES E. CORSIGLIA, and
BERNARD R. KERNS,

whose full and true names, and the full and true name of each of whom, except as herein mentioned, are otherwise unknown to this Grand Jury (hereinafter called ‘said defendants’), at a time and place to the Grand Jurors unknown, did knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree together, and with divers other persons to the Grand Jurors unknown, unlawfully and feloniously to commit offenses against the United States of America, to-wit, violations of the Second War Powers Act, Title 50 U.S.C.A. Section 633, and rationing regulations prescribed and made in pursuance of the authority granted in said Second War Powers Act pertaining to a rationed commodity, to-wit, gasoline, and to defraud the United States of America, in the exercise and control of its lawful

governing powers and functions, by impairing, obstructing and defeating the due and proper administration of the Second War Powers Act, and ration regulations made in pursuance of the authority granted in said Act, and the rules and regulations prescribed in reference thereto for the enforcement of the provisions of said Act, in the manner following, to-wit:

(a) By the said defendants and each of them unlawfully and wilfully acquiring, using, permitting the use of, possessing and controlling counterfeited and forged ration documents, to-wit, counterfeited and forged C-2 gasoline mileage ration coupons, under circumstances which would be in violation of Section 2.6 of General Ration Order No. 8 if the said counterfeited and forged ration documents were genuine, that is to say, the said defendants, or any of them, were not then and there or at any time, persons, or the agent or agents of persons, to whom said C-2 gasoline mileage ration coupons were issued, or by whom said C-2 gasoline mileage ration coupons were acquired in accordance with the provisions of Ration Order No. 5 (c), as the said defendants then and there well knew.

(b) By the said defendants, and each of them, unlawfully and wilfully transferring and assigning counterfeited and forged ration documents, to-wit, counterfeited and forged C-2 gasoline mileage ration coupons, under circumstances which would be in violation of Section 2.6 of General Ration Order No. 8 if the said counterfeited and forged ration coupons were genuine, that is to say, the said defendants were

not then and there, or at any time, persons, nor the agent or agents of any persons, to whom said ration documents were issued, or by whom said ration documents were acquired in accordance with the provisions of a ration order, nor were said defendants, or any of them, then and there, or at any time, persons authorized to so transfer or assign said ration documents in accordance with the provisions of a ration order, to-wit, Gasoline Mileage Ration Order No. 5 (c), or any other ration order, as the said defendants then and there well knew.

(c) By the said defendants and each of them, with the intent and for the purpose of defrauding the United States in the exercise and control of its lawful governmental powers and functions, impairing, obstructing, frustrating and defeating the due and proper administration of the Second War Powers Act, and the ration regulations promulgated and issued thereunder pertaining to a rationed commodity, to-wit, gasoline, by unlawfully acquiring, using, permitting the use of, transferring, possessing and controlling counterfeited and forged ration documents, to-wit: counterfeited and forged C-2 gasoline ration coupons, under circumstances which would be in violation of Section 2.6 of General Ration Order No. 8 if the said counterfeited and forged ration documents were genuine, that is to say, said defendants, or any of them, were not at any time persons or the agent or agents of persons to whom such ration documents were issued or by whom the same were acquired from a War Price and Rationing Board of the Office of Price Adminis-

tration, a department and agency of the United States, in accordance with Ration Order 5 (c) or any other ration order, nor did said defendants, or any of them, transfer said ration documents in accordance with the provisions of Ration Order No. 5 (c) or any other ration order; and by unlawfully acquiring, using, permitting the use of, transferring, possessing and controlling counterfeited and forged ration documents, to-wit, counterfeit and forged C-2 gasoline mileage coupons, with the intent and for the purpose of unlawfully obtaining for themselves and each of them, and with the intent and for the purpose of enabling other persons to the Grand Jurors unknown to unlawfully obtain a rationed commodity, to-wit, gasoline, to which said defendants, or any of them, or any of said persons, were not at any time herein mentioned entitled, by the use and transfer of said counterfeited and forged documents.

(d) By the said defendants, and each of them, obtaining and attempting to obtain for themselves, and each of them, and for other persons to the Grand Jurors unknown, a rationed commodity, to-wit, gasoline, without presenting the prescribed ration coupons therefor; that during the existence of said conspiracy and in furtherance thereof, and to effect its objects, in the said Division and District, and within the jurisdiction of this Court, one or more of said defendants, as hereinafter mentioned by name, did the following overt acts, to-wit:

1. That on or about the 10th day of February, 1944, in the City and County of San Francisco, State of

California, the said defendant Percy Newford transferred to the said defendant Arthur Grenier, 6 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

2. That on or about the 9th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Arthur Grenier met and held a conversation with one Angelo Guisti.

3. That on or about the 9th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Arthur Grenier met and held a conversation with one Dominic Rossi.

4. That on or about the 16th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Percy Newford transferred to one Angelo Guisti, 16 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

5. That on or about the 16th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Russell S. Youmans transferred to the said defendant Albert Norwitt, 25 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

6. That on or about the 16th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Russell S. Youmans transferred to the said defendant Percy Newford, 30 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

7. That on or about the 6th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Russell S. Youmans transferred to the said defendant Charles E. Corsiglia, 9 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

8. That on or about the 6th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Charles E. Corsiglia transferred to the said defendant Bernard R. Kerns, 9 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

9. That on or about the 11th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Percy Newford transferred to the said defendant Frank Laurent, 40 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

10. That on or about the 16th day of February, 1944, in the City and County of San Francisco, State of California, the said defendant Russell S. Youmans, at his residence at 915 Pacific Avenue, San Francisco, California, had in his possession, 1258 sheets, each sheet containing 64 counterfeited and forged C-2 gasoline mileage ration coupons.

FRANK J. HENNESSY,

FRANK J. HENNESSY,

United States Attorney.

(Approved as to Form:

R. B. M-M)'' (Tr. pp. 2-8.)

APPELLANT'S ASSIGNMENTS OF ERROR.**1.**

That the learned trial judge committed errors in law arising during the course of the trial, and erred in the decision of questions of law arising during the course of the trial.

2.

That the evidence produced and received upon the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

3.

That the learned trial judge erred in denying the motion made by counsel for defendant for a directed verdict of "Not Guilty" at the conclusion of the case of the prosecution, for the reason that taking said evidence in said case is not sufficient as a matter of law to support a verdict of "Guilty".

4.

That the trial Court erred in not instructing the jury to return a verdict of "Not Guilty" in favor of appellant.

FACTS OF THE CASE.

At approximately 7:30 P.M., on February 16, 1944, one Frank Brush, an investigator for the Office of Price Administration, at San Francisco, together with two police inspectors, visited the home of one Russell

S. Youmans, at 915 Pacific Avenue, in San Francisco, and at said time and place received from Youmans a suitcase containing 1258 sheets of "C-2" counterfeit gasoline mileage ration coupons, also the sum of \$10,482.00.

Following this meeting with Youmans, and on February 23, 1944, at 1355 Market Street, San Francisco, Brush had a conversation with appellant in regard to the C-2 coupons pasted on the bingo sheets which had been turned in by appellant for replacements of gasoline. The appellant identified his name on the bingo sheets, and stated that he had exchanged five gallons of gasoline for each "C-2" coupons that appeared on the sheets; that he had acquired the coupons in the normal course of business; and that the license numbers appearing on the coupons had been placed there by the customers, and that he had delivered gasoline for every license number appearing on the sheets. Brush advised appellant that 325 of the 387 coupons appearing on the bingo sheets were counterfeit and that appellant could not have taken the counterfeit coupons if he had checked the license number with the coupons, as the sheets did not have identifications on the top, to which appellant replied that he did not know anything about it.

The coupons appearing on the bingo sheets had been turned in by appellant to the distributors for the replacement of gasoline sold. Brush further testified that the coupons appearing on the bingo sheets marked "X" on the face thereof were genuine coupons, the balance being counterfeit.

Appearing on two of the counterfeit coupons was the license number 01G627; appearing on three of the counterfeit coupons was the license number 24B575; appearing on three of the counterfeit coupons was the license number 02G699; appearing on one of the counterfeit coupons was the license number 70A319; appearing on two of the counterfeit coupons was the license number 32B786; appearing on two of the counterfeit coupons was the license number 99F271; appearing on three of the counterfeit coupons was the license number 26B996. The balance of the license numbers appearing on the coupons were fictitious numbers.

Ernest N. Hart testified that he owned a Plymouth 4-door sedan, license number 01G627; that he used "A" coupons for the same; that he never had any "C" coupons; that he had never bought gasoline from the Post Street Garage, nor had any of his family done so. (Tr. p. 36.)

John E. Duff testified that he owned a Lincoln sedan, license number 24B575; that he used "A" coupons for the same; that he never had any "C-2" coupons, and never purchased gasoline from the garage at 740 Post Street. (Tr. p. 37.)

William Irving Smith testified that the license number of his car was 02G699; that he used "A" coupons for the same; that he never delivered three "C-2" coupons to the Post Street Garage, nor did any member of his family. (Tr. p. 38.)

William Singer testified that the license number of his car is 70A319; that he used "A" coupons, and never purchased any gasoline from the Post Street Garage. (Tr. pp. 38, 39.)

Bernard A. Beukers testified that the license number of his car is 32B786; that he never purchased gasoline at the Post Street Garage. (Tr. p. 39.)

Bert F. Biscotto testified the license number of his car is 99F271; that he used "A" coupons for the same; and that he never purchased any gasoline from the Post Street Garage. (Tr. pp. 39, 40.)

Frank Cushere testified that the license number of his car was 26B996; that he used "A" coupons for the same; that he had never had "C-2" coupons issued to him, nor had he ever purchased gasoline at the Post Street Garage. (Tr. p. 40.)

Percy Newford testified that he was a defendant in the case, having pleaded guilty to the indictment, and was then awaiting the judgment of the Court; that he knew the defendants Russell Youmans and Frank Laurent; that he met Frank Laurent about November or December, 1943, at Laurent's garage at 740 Post Street, about four o'clock; that at this time and place he had a conversation with Laurent, in which he asked Laurent if he wanted any gas tickets. Laurent said he could use a couple, and Newford sold to Laurent two sheets, 64 coupons to a sheet, for \$20.00 a sheet which he, Newford, had obtained from Youmans. Later, and between the latter part of January and the 10th of February, Newford met Laurent about 9:00 o'clock at

night at the Russian Tea House on Geary Street, between Fillmore and Steiner; Laurent came in with some other gentleman. Newford had a conversation with Laurent, in which Laurent stated he needed a lot of gas sheets, and he said he would give Newford \$600.00 for forty of them. Newford told Laurent he did not want to have anything to do with them, and Laurent said, "*If you don't sell them I can go right down to Pacific Street to the same address you get them and get all I want.*" (Italics supplied.) Following a brief conversation, Newford sold Laurent forty sheets for \$600.00; he delivered the sheets to Laurent and received from Laurent the \$600.00. The coupons sold by Newford to Laurent were obtained by Newford from Youmans.

Newford further testified that Youmans lived on Pacific Street; that the coupons being Government Exhibit in Evidence 3, were identical with the coupons sold to Laurent at that time and place. Newford further testified that he had then and there asked Laurent why he came to see him when Laurent had other people he used to get these coupons from, to which Laurent replied that the other people did not have any more and he came to see Newford *as it was too late to see this other party on Pacific Street.* (Italics supplied.) Newford asked Laurent how much he sold the coupons for, to which Laurent replied, "None less than \$35 a sheet".

On cross-examination Newford reiterated his testimony that he had first met Laurent during November or December, at Laurent's garage, and sold coupons

to Laurent for \$20.00 a sheet; that he only knew the man with Laurent by the name of George; that George brought Laurent to the Russian Tea Room, where at first Laurent wanted to buy forty sheets and would pay \$15.00 apiece for each one; that Newford at first declined to do business, but later sold the forty sheets to Laurent; that George did not introduce Laurent to Newford, as he, Newford, already knew Laurent; that at this conversation Laurent stated that he had been getting coupons from the same address as Newford obtained them on Pacific Street. (Tr. pp. 32-36.)

Ida Adelaide Oppenheim testified that she lived at 701 Post Street, and during the months of January and February, 1944, parked her car at the Post Street Garage; that she knew Frank Laurent; that he was the owner or operator of the Post Street Garage; that she had a conversation with Laurent in connection with the sale of gasoline coupons in the early part of February, or the last part of January, 1944, this conversation taking place at Laurent's garage; that in answer to her question to Laurent, how was she to get gas, he said, "Why don't you buy a book for \$11?" (Tr. p. 44.)

Thomas B. Foster testified that for 43 years he had been connected with the United States Secret Service, and for the past six years had been Supervising Agent of the Fourteenth District Secret Service; that during the course of his business with the Secret Service he had made a study of counterfeit bills and documents; that he had examined Government's Exhibit No. 1, being 1258 sheets of "C-2" gasoline coupons, and that

the same were counterfeit; that he had examined Government's Exhibit No. 3 in Evidence, being the coupons appearing on the bingo sheets of appellant; that most of the same were counterfeit; that the counterfeit coupons appearing on Government's Exhibit No. 3 were made by the same party as the coupons on Government's Exhibit No. 1, and were of the same make. (Tr. pp. 45-48.)

ARGUMENT.

It is the contention of appellant that the trial Court erred in admitting the testimony of the witness Frank Brush relating to the visit of Brush to the home of Russell Youmans and the 1258 sheets of "C-2" gasoline coupons, as well as \$10,472.00 in cash; that if appellant was not present such testimony was hearsay and in no way binding upon appellant; and, further, that the trial Court erred at the conclusion of the Government's case in denying appellant's motion for an advised verdict, for the reason that no evidence of a conspiracy was introduced during the course of the trial. In this connection it will be remembered that the indictment charged all of the persons named therein with conspiring to commit offenses against the United States, to-wit, violations of the Second War Powers Act, Title 50 U.S.C.A., Section 633, and rationing regulations prescribed and made in pursuance of the authority granted in said Act pertaining to a rationed commodity, to-wit, gasoline, and to defraud the United States of America in the exercise and con-

trol of its lawful governmental powers and functions by impairing, obstructing and defeating the due and proper administration of the Second War Powers Act and rationing regulations made in pursuance of the authority granted in said Act, and the rules and regulations prescribed in reference thereto for the enforcement of the provisions of said Act.

There can be no question from the evidence as reflected in the record in this case that the appellant on two occasions purchased gasoline coupons from his co-defendant Percy Newford, nor is there any question, as reflected in the record, that the coupons so obtained by the appellant were identical with, and made by the same person or persons making the counterfeit coupons found in the possession of appellant's co-defendant Russell Youmans. And it is further established that appellant had relations in connection with gasoline coupons with his co-defendant Russell Youmans and had knowledge of Youmans' unlawful activities in the sale and distribution of coupons. All of this was shown in the testimony of Newford. That the appellant unlawfully purchased coupons from his co-defendant Newford is established by Newford's testimony, and is further corroborated by the appearance of said counterfeit coupons on appellant's bingo sheets. These "C-2" coupons had been used by appellant in replenishing his gasoline stock, and fictitious license numbers had been placed thereon, as was established by the record.

Appellant concedes that if the testimony of the witness Newford be accepted as true, which obviously

was done by the jury, as evidenced by the verdict against appellant, appellant would be guilty of a substantive charge of unlawfully purchasing gasoline coupons, but under the facts in the present case it had not been established that appellant was engaged in a conspiracy with his co-defendants unlawfully to acquire, possess, or distribute gasoline coupons. Appellant submits in his argument on this point there can not be a conspiracy between a seller and a buyer of contraband goods. This might be a correct statement of the law if the contraband by its nature was limited in its use to the seller or the buyer, but as is established by the facts in this case the contraband was counterfeit "C-2" gasoline coupons, unlawfully acquired, possessed and distributed by the appellant, and which contraband by its very nature contemplates necessarily that the same must be, under the facts in this case, unlawfully acquired, possessed and distributed. The purchaser in acquiring the coupons, as was done in this case, knows of necessity that the seller, too, was in unlawful possession of the same and was in violation of the law in selling the same, as he, the purchaser, is in violation of the law in acquiring the coupons, and in doing so it is, nor was not, intended that the offense should stop upon appellant's purchase of the contraband, but on the contrary appellant purchased the same for the purpose of continuing to violate the law in distributing and using the same unlawfully in the sale and acquisition of the gasoline.

As was said in the case of *Lew Moy v. United States*, 237 F. 51:

“The acts and statements of one co-conspirator done or entered in facilitating the purpose of the conspiracy are admissible against others. It is not necessary that each conspirator participate in each step or stage of the common general design. One of them may do one thing, another, another. Some may take major parts while the participation of others may be in a minor degree.”

That the act of one conspirator in furtherance of the common design is the act of all was held in the cases of

Olmstead v. United States (C.C.A. 9), 5 F. (2d) 712;

Coates v. United States (C.C.A. 9), 59 F. (2d) 173.

Also see the case of *United States v. Lesher* (C.C.A. 9), 59 F. (2d) 53, in which case the Court said:

“The sole issue is alleged error in overruling defendant’s motion for a directed verdict. This case, like all like cases, has its difficulties. The court does not weigh the evidence, but considers whether there is any or sufficient evidence to sustain a verdict. See *Ford v. United States* (C.C.A.), 44 F. (2d) 754. The trial judge must, in the exercise of sound discretion, determine whether upon the evidence produced a verdict can be sustained, not weigh the evidence; if there is evidence, it must be submitted; if not, it is pronouncedly his duty to direct a verdict.”

Also in considering the evidence on a motion for a directed verdict, the evidence must be considered in its most favorable aspect to the appellee.

United States v. Scarborough, 57 F. (2d) 137;

Knable v. United States, 9 F. (2d) 567;

Benton v. United States, 202 F. 344;

Kelly v. United States, 258 F. 392.

Also, in the case of *United States v. Valenti*, 134 F. (2d) 362, at page 364, the Court said:

“It is the essence of a conspiracy conducted by other than the veriest bunglers that its terms be not expressed, but only gathered by implication from conduct.”

In this connection, it will be remembered that all of the defendants were charged with unlawfully acquiring, possessing, and distributing gasoline coupons with the intent and for the purpose of unlawfully obtaining for themselves, and with the intent and for the purpose of enabling other persons to the Grand Jurors unknown to unlawfully obtain a rationed commodity, to-wit, gasoline, to which said defendants, or any of them, or any of said persons, were not at any time herein mentioned entitled, by the use and transfer of said coupons.

On this point see the case of *Direct Sales Co. v. United States*, 319 U. S. 703, which case clearly distinguishes the *Falcone* case, 311 U. S. 204, which case is heavily relied upon by appellant, to the effect that:

“So long as the seller does not know there is a conspiracy between the buyer and others, he can

not be guilty of conspiring with the buyer to further the latter's illegal and known intended use, by selling goods to him."

And in distinguishing the *Falcone* case, the Court, at page 710 stated:

"The commodities sold there were articles of free commerce, sugar, cans, etc. They were not restricted as to sale by order form, registration, or other requirements. When they left the seller's stock and passed to the purchaser's hands, they were not in themselves restricted commodities, incapable of further legal use except by compliance with rigid regulations, such as apply to morphine sulfate. *The difference is like that between toy pistols or hunting-rifles and machine guns.* All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade.

"*This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote and cooperate in it. This intent, when given effect by overt acts, is the gist of conspiracy.* While it is not identical with mere knowledge that another purposes unlawful action, it is not un-

related to such knowledge. Without the knowledge, the intent cannot exist. *United States v. Falcone*, supra. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. *Ibid.* This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes.

“The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latter’s inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully.” (*Italics ours.*)

Also, see the case of *United States v. Bruno*, 105 F. (2d) 921. (Note this case was reversed in the Supreme Court in 308 U. S. 287, but on an entirely different point than is involved in the instant case.)

“The first point was made at the conclusion of the prosecution’s case: the defendants then moved to dismiss the indictment on the ground that several conspiracies had been proved, and not the one alleged. The evidence allowed the jury to find that there had existed over a substantial period of time a conspiracy embracing a great number of persons, whose object was to smuggle narcotics into the Port of New York and distribute them to addicts both in this city and in Texas and Louisiana. This required the cooperation of

four groups of persons; the smugglers who imported the drugs; the middlemen who paid the smugglers and distributed to retailers; and two groups of retailers—one in New York and one in Texas and Louisiana—who supplied the addicts. The defendants assert that there were, therefore, at least three separate conspiracies; one between the smugglers and the middlemen, and one between the middlemen and each group of retailers. The evidence did not disclose any cooperation or communication between the smugglers and either group of retailers, or between the two groups of retailers themselves; however, the smugglers knew that the middlemen must sell to retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. *Thus the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers.* That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned was dependent upon the success of the whole. That distinguishes the situation from that in *United States v. Peoni*, 2 Cir., 100 F. 2d 401, where Peoni, the accused, did not know that Regno, his buyer, was to sell the counterfeit bills to Dorsey, and had no interest in whether he did, since Regno might equally well have passed them to innocent persons himself. *Rudner v. United States*, 6 Cir., 281 F. 516, 519, 520; *Jezewski v. United States*, 6 Cir., 13 F. 2d 599, 602. It might still be argued that there were two conspiracies; one including the smugglers, the middlemen and the New York

group, and the other, the smugglers, the middlemen and the Texas & Louisiana group, for there was apparently no privity between the two groups of retailers. That too would be fallacious. Clearly, quoad the smugglers, there was but one conspiracy, for it was of no moment to them whether the middlemen sold to one or more groups of retailers, provided they had a market somewhere. So too of any retailer; he knew that he was a necessary link in a scheme of distribution, and the others, whom he knew to be convenient to its execution, were as much parts of a single undertaking or enterprise as two salesmen in the same shop. We think therefore that there was only one conspiracy, and it is not necessary to decide how far *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314, would independently have covered the situation, had there been more than one." (*Italics ours.*)

As to the sufficiency of the evidence generally, see the case of *Abrams v. United States*, 250 U. S. 616, 619:

"The claim chiefly elaborated upon by the defendants in the oral argument and in their brief is that there is no substantial evidence in the record to support the judgment upon the verdict of guilty and that the motion of the defendants for an instructed verdict in their favor was erroneously denied. A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict." (*Citing cases.*)

To the same effect see *Maugeri v. United States*, (C.C.A. 9), 80 F. (2d) 199, at 202; and *Hemphill v. United States* (C.C.A. 9), 120 F. (2d) 115, at 117.

It is respectfully submitted that the facts in the instant case fall squarely within the rule as stated in the *Direct Sales* case, *supra*, and the *Bruno* case, *supra*. In the aforementioned cases, the contraband was narcotics; in the present case the contraband was counterfeit gasoline coupons which had been unlawfully acquired, possessed and transferred. In view of the rationing regulations prohibiting the irregular acquisition, possession and transfer of gasoline coupons, the appellant in trafficking in counterfeit coupons was clearly in the position of a conspirator, as set forth in the *Bruno* case. He knew "that the unlawful venture had not started with his seller", and that it would not, and did not, stop with his purchase of the counterfeit "C-2" coupons.

CONCLUSION.

It is respectfully submitted that the evidence is sufficient to sustain the verdict of guilty, that appellant has shown no error, and that the judgment should be affirmed.

Dated, San Francisco,
January 15, 1945.

FRANK J. HENNESSY,
United States Attorney.

REYNOLD H. COLVIN,
Assistant United States Attorney.

Attorneys for Appellee.

No. 10,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK LAURENT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF.

FRANK J. HENNESSY,

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FILED

APR 20 1945

PAUL P. O'BRIEN,
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Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF.

This Honorable Court having on March 31, 1945, ordered that appellee file and serve on opposing counsel, within twenty days, a supplemental brief conforming to Rule 20 (f), appellee does submit the following supplement of statutes and regulations:

Title 18 *U.S.C.* Section 88.

Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both. (R.S. §5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, §37, 35 Stat. 1096.

Second War Powers Act of 1942—approved March 27, 1942. Pub. L., No. 507, 77th Cong., 2d Sess. c. 199; 56 Stat. 176; 50 U.S.C.A., Appx. 633.

Title III of the Second War Powers Act of 1942 which was enacted March 27, 1942, section 2(a) 2 thereof, provides:

“Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.”

Subdivision 5 of that section provides:

“Any person who willfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this sub-section (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.”

Subdivision 8 of section 2(a) 2 provides that:

“The President may exercise any power, authority, or discretion conferred on him by this subsection (a) through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.”

Pursuant to Executive Order No. 9125 (7 Federal Register 2719), the President conferred upon the Chairman of the War Production Board the power to exercise the authority and discretion conferred upon the President of the United States by Title III of the Second War Powers Act of 1942.

The War Production Board by Directive No. 1 (7 Federal Register, 562), entitled "Delegation of Authority to the Office of Price Administration with respect to Rationing", provides:

"(a) The Office of Price Administration is authorized and directed to perform the functions and exercise the power, authority and discretion conferred upon the President."

The War Production Board by Supplementary Directive No. 1 H (7 Federal Register, 3478), relating to the Delegations of Authority, provides in section (a) that:

"In order to permit the efficient rationing of gasoline, the authority delegated to the Office of Price Administration in Section 903.1 (Directive No. 1) is hereby extended to include the exercise of rationing control over the sale, transfer or other disposition of gasoline by any person to any consumer as defined in paragraph (c) hereof, and the term 'consumer' means any person who acquires gasoline for use rather than transfer and any other person to the extent to which he uses gasoline irrespective of the purpose for which the gasoline was obtained by him."

The War Production Board Amendment 2 to Supplementary Directive 1 H, which directive is entitled:

“Further Authorization of Office of Price Administration in Gasoline Rationing”, provides in section 903.9 (a):

“In order to permit the efficient rationing of gasoline, the authority delegated to the Office of Price Administration in Section 903.1, Directive No. 1, is hereby extended to include the following: (1) The exercise of rationing control over the sale, transfer, delivery or other disposition of gasoline by any person to any consumer in cases in which such consumer is within the limitation area, and over the use of gasoline by any such consumer.”

The War Production Board by Supplementary Directive No. 1 Q (7 Federal Register 912) entitled, “Rationing of Tire, Tire Casings, Tire Tubes, etc.” provides:

“(a) The authority heretofore delegated to the Office of Price Administration by Directive No. 1, Section 9031, is hereby extended to include the exercise of control over.” (Many things.)

Subdivision 3:

“The sale, transfer, delivery or other disposition of gasoline by any person to any consumer, the use of gasoline by any consumer, the use of gasoline substitutes or gasoline blends by any consumer in a motor vehicle, and the blending by any gasoline dealer.”

Subdivision 4:

“The sale, transfer, delivery or other disposition of gasoline by any person to any person other than a consumer, to the extent of requiring the delivery

of such coupons, certificates or other evidence as the Office of Price Administration may prescribe as a condition to such sale, transfer, delivery or disposition."

General Ration Order No. 8, effective April 15, 1943 (8 F. R. 3783), issued by Administrator, Office of Price Administration, provides:

1305.53. "*General prohibitions, penalties and conditions.* Under the authority vested in the Administrator by Executive Order No. 9125, Directive No. 1 of the War Production Board and Food Directive No. 3 issued by the Secretary of Agriculture, General Ration Order No. 8 (General Prohibitions, Penalties and Conditions) which is annexed hereto and made a part hereof, is hereby issued."

ARTICLE II.

Section 2.5. "Acquisition, use, transfer or possession of counterfeited or forged ration document. No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged."

Section 2.6. "Acquisition, use, transfer or possession of ration document. No person shall acquire, use, permit the use of, possess or control a ration document except the person or the agent of the person to whom such ration document was issued or by whom it was acquired in accordance

with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order."

Section 2.8. "Wrongful acquisition, possession, use or transfer of rationed commodity. No person shall acquire, possess, use, permit the use of, sell or otherwise transfer a rationed commodity except in accordance with the provisions of a ration order. No person shall possess, use, permit the use of, sell or otherwise transfer any rational commodity acquired in violation of a ration order."

ARTICLE III.

Section 3.1. "Criminal prosecution. Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required, by any ration order, shall be fined not more than \$10,000 or imprisoned for not more than one year, or both, and shall be subject to such other penalties as may be prescribed by law."

Ration Order No. 5C (7 F. R. 9135) effective November 9, 1942, except that the provisions of section 1394.8151 to 1394.8180, inclusive, and the provisions of 1394.8201 to 1394.8227, inclusive became effective December 1, 1942, was issued "Pursuant to the authority vested in me (Administrator, OPA) by War Production Board Directive No. 1, issued January 24, 1942, and by Supplementary Directive No. 1Q issued November 6, 1942". (Preamble.)

1394.8152. “*Transfers to consumers.* On and after November 22, 1942, and notwithstanding the terms of any contract, agreement, or commitment, regardless of when made, a dealer or distributor may transfer gasoline to a consumer, and a consumer may accept such transfer of gasoline, only in exchange for valid coupons, except as provided in 1394.8153 (c), 1394.8154, 1394.8155, and 1394.8156.”

1394.8153. “*Transfers to consumers in exchange for coupons and ration checks and gasoline purchase permits.*—(a) Coupons issued for registered and commercial motor vehicles. Transfers may be made and accepted under the following conditions in exchange for Class A, B, C, D, or T coupons having an aggregate unit value equal to the amount of gasoline transferred. However, if the transferee is able to accept only a portion of the amount of gasoline represented by the unit value of the coupon, the transferor shall nevertheless require the surrender of an entire coupon.”

(1) “In the case of a coupon issued in a ration book, the transferor at the time of transfer, must require presentation of the coupon book and must detach therefrom coupons having an aggregate unit value equal to the amount of gasoline transferred. No transfer may be made pursuant to this subparagraph in exchange for a coupon detached before the presentation of the coupon book to the transferor.”

(2) “In the case of a serially numbered coupon issued in strips in connection with an identifying folder, the transferor, at the time of transfer, must require presentation of the coupons and

the identifying folder. No transfer may be made pursuant to this subparagraph in exchange for a coupon which does not bear a serial number included in the sequence of serial numbers specified on the cover of the identifying folder.”

(3) “Transfer may be made only into the fuel tank of a motor vehicle identified on the coupon book or folder presented and only if a sticker corresponding to the class of coupon book or coupon presented is conspicuously displayed on such vehicle, as required by the provisions of 1394.8165 relating to stickers. These rules, however, are subject to the following three exceptions:

(i) ‘Upon the presentation of a Class A book, transfer may be made into the fuel tank of a passenger automobile identified on such book if a Class B or C sticker is displayed.’

(ii) ‘If the ration book or identifying folder bears a notation by a Board indicating that bulk transfer is authorized, a bulk transfer may be made in exchange for a coupon contained in such book or bearing a serial number included in the serial numbers specified on such folder.’

(iii) ‘Bulk transfer may also be made, of an amount of gasoline not in excess of one unit, to enable a vehicle stranded for lack of gasoline to reach a source of supply; in such case the transferor shall retain the ration book presented, or the identifying folder and coupons presented, until the vehicle is brought to the place of transfer for identification.’ ”

(4) “Transfer may be made only on and after the validity date noted on the cover of the ration book or identifying folder presented or, in the

case of a Class A book only during the valid period of the coupon in exchange for which the transfer is to be made. In the case of rations issued for leased vehicles and special rations which bear an expiration date, and of Class T coupons, transfers may be made only during the valid period noted on the cover of the book or identifying folder which is presented."

(5) "Transfer may be made only in exchange for coupons bearing the notations required by 1394.8004(e) * * *"

1394.8004(e). "*Notations by ration holder.* Immediately upon receipt of any ration coupons each person to whom such coupons are issued shall write, stamp or print on the face of the coupons issued to him the following information:

(1) "In the case of Class A coupons, the license number and state of registration of the vehicle for which such ration was issued."

(2) "In the case of Class B, C, D and T coupons, the license number and state of registration of the vehicle for which the ration was issued. However, in the case of interchangeable ration books and folders accompanying serially numbered coupons issued for use interchangeably among fleet or official vehicles, the information shall be the official or fleet designation (or the certificate of war necessity number in the case of commercial vehicles not bearing fleet designations) and the state and city or town in which the principal office of the fleet operator is located; or in the case of ration books and folders accompanying serially numbered coupons issued for use interchangeably among other motor vehicles or

for use in motor vehicles which have not been assigned specific license numbers, the information shall be the name and address of the person to whom the ration was issued."

1394.8207. "*Restriction on transfers to dealers.*

(a) (1) Except as provided in 1394.8209, no dealer or distributor shall transfer or offer to transfer gasoline to a dealer, and no dealer shall receive a transfer of gasoline, except in exchange for a quantity of coupons or other evidences at the time of the actual delivery of the gasoline or in advance thereof, equal in gallonage value to the quantity of the gasoline transferred, or, in cases in which gasoline is regularly transferred to him on a temperature adjustment basis, equal in gallonage value to the adjusted quantity of gasoline transferred: Provided, That transfers of gasoline may be made only in exchange for coupons which bear the notations required by paragraphs (d) and (e) of 1394.8004, paragraph (c) of 1394.8006 and paragraph (b) of 1394.8206, and which have been affixed to coupon sheets containing the name, address, date of surrender and unit value of the coupons as prescribed in 1394.8211."

Dated, San Francisco,

April 20, 1945.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

REYNOLD H. COLVIN,

Assistant United States Attorney,

Attorneys for Appellee.

7
No. 10810

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

VS.

LAWRENCE R. GREEN,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

SEP 15 1944

PAUL P. O'BRIEN.
CLERK



No. 10810

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

W. E. BAIRD, ESQ.

For Comm'r:

ANGUS R. SHANNON, ESQ.

Transferred to Judge Smith, 11-12-43.

Docket No. 109145

LAWRENCE R. GREEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1941

Nov. 12—Petition received and filed. Taxpayer notified. Fee paid.

Nov. 12—Copy of petition served on General Counsel.

Dec. 31—Answer filed by General Counsel.

Dec. 31—Request for hearing in Los Angeles, Calif., filed by General Counsel.

1942

Jan. 5—Notice issued placing proceeding on Los Angeles, Calif. calendar. Service of answer and request made.

1942

- Feb. 4—Request for transfer to Kansas City, Mo. calendar filed by taxpayer. February 9, 1942 Granted.
- Sep. 29—Hearing set November 2, 1942 in Kansas City, Missouri.
- Nov. 3—Hearing had before Judge Smith, on merits. Motion of parties to consolidate with 108546—Granted. Motion of petitioner to receive amended petition. No objection respondent. Submitted. Stipulation of facts filed. Amended petition filed. Briefs due 12-17-42. No exchange.
- Nov. 17—Transcript of hearing 11-3-42 filed.
- Dec. 11—Answer to amended petition filed by General Counsel. Copy served 12-12-42.
- Dec. 11—Joint motion to amend stipulation of facts filed. 12-11-42 Granted.
- Dec. 15—Brief filed by taxpayer.
- Dec. 17—Brief filed by General Counsel.

1944

- Jan. 19—Opinion rendered. Judge Smith, Div. 5. Decision will be entered under Rule 50. 1-9-44. Copy served.
- Feb. 12—Agreed computation of deficiency filed.
- Feb. 16—Decision entered. Judge Smith, Div. 5.
- May 5—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.
- May 16—Proof of service filed by General Counsel.
(W. E. Baird)

1944

May 18—Proof of service filed by General Counsel.
(Lawrence Green)

May 26—Designation of portions of record to be
contained in record on review filed by General Counsel.

May 26—Statement of points filed by General Counsel.

Jun. 5—Proof of service filed.

Jun. 9—Proof of service of designation of portions
of record and statement of points filed.

[1*]

United States Board of Tax Appeals

Docket No. 109145

LAWRENCE R. GREEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PB) dated August 16, 1941, and as a basis of his proceeding alleges as follows:

1. Petitioner is an individual, whose residence ad-

dress is 2440 Pine Street, San Diego, California. The return for the period involved was filed with the Collector of Internal Revenue for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on August 16, 1941.

3. The taxes in controversy are income and surtaxes for the calendar year 1939, in the amount of \$646.27.

4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors: [1A]

(a) Commissioner erred in determining that interest in the amount of \$4,143.01, paid by the petitioner in satisfaction of his obligation arising from being a transferee and/or executor of the Estate of L. K. Green, was not an allowable deduction from gross income.

(b) Commissioner erred in determining that legal, accounting, and sundry other expenses amounting to \$1,655.10, paid by petitioner in connection with various taxes and other business matters, was not an allowable deduction from gross income.

(c) Commissioner erred in determining that the expense of Babson's Financial Service Reports, \$180.00, and rental of a safety Deposit box, \$10.00, paid by petitioner, was not an allowable deduction from gross income.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) Petitioner is an individual, a native born citizen of the United States and a resident of California, whose address is 2440 Pine Street, San Diego, California. During 1939 petitioner was under no statutory disability to prevent his entering into and carrying on any business of a legal nature.

(b) Petitioner for the year 1939 duly filed an income tax return, Form 1040, with the Collector of Internal Revenue for the Sixth District of California. In previous years, and for the year 1939, petitioner returned his income and expenses on the basis of cash receipts and disbursements. [2]

(c) In his income tax return for 1939, petitioner claimed as a deduction from gross income interest paid by him during 1939, in the amount of \$4,143.01, being interest paid on an amount representing one-half of additional Federal estate taxes with respect to the Estate of L. K. Green. The Commissioner disallowed the deduction.

(d) Taxpayer's father, L. K. Green, died July 5, 1930, leaving a will making the petitioner and his brother, Ralph J. Green, the two and only residuary beneficiaries of his estate. The two were to share equally in the estate.

(e) The petitioner was duly appointed, qualified, and acted as executor of the L. K. Green Estate.

(f) An estate tax return was duly prepared and filed, and the tax shown thereon was paid. Upon examination of the return, an additional assessment was also paid by the Estate. This deficiency was

not the additional assessment with respect to which the interest in controversy arose.

(g) The Estate of L. K. Green was probated in Johnson County, Kansas. Final report of the executor was filed as of September 4, 1931, showing all specific bequests as having been paid and asking for order for final distribution to residuary beneficiaries and discharge of executor. The final distribution was accomplished, and, on October 13, 1931, the executor of the Estate of L. K. Green was discharged and given full and complete release. [3]

(h) Subsequent to the final settlement of the Estate, the United States Treasury Department asserted the possibility of large additional taxes, either in the nature of additional income taxes or additional estate taxes with respect to the estate of L. K. Green, or additional income taxes for the petitioner and other persons. The amount of such taxes of various kinds being claimed by the United States Government was large. The contemplated additional taxes against the Estate of L. K. Green at one time was over \$100,000.00. The petitioner and/or his brother would have been liable for the payment of such additional tax if it had been sustained, but petitioner and his brother did not believe any such amount of tax was assessable and declined to agree to the payment of such deficiency.

(i) After correspondence, examinations, and negotiations lasting over a period of several years, the matter was finally settled by the residuary beneficiaries (the petitioner and his brother) paying, in July, 1939, an agreed amount of estate tax defi-

ciency, \$17,244.81 plus interest thereon at 6% per annum for eight years and three days from July 5, 1931, to July 8, 1939, in the total amount of \$8,286.01. The petitioner paid one-half of the deficiency and interest and his brother paid the other half.

(j) The interest accruing on the deficiency of \$17,244.81, before and after the final settlement of the Estate of L. K. Green, is as follows:

	Interest on Total Deficiency	One-half Paid by Petitioner
From July 5, 1931 to		
October 13, 1931	\$ 280.64	\$ 140.32
From October 14, 1931 to		
July 8, 1939	8,005.37	4,002.69
	<hr/>	<hr/>
	\$ 8,286.01	\$ 4,143.01

[4]

(k) The Estate of L. K. Green had been entirely distributed and had no assets or funds with which to pay a tax after October 13, 1931. The tax deficiency became the obligation of petitioner and his brother because of their being transferees of the Estate of L. K. Green, and the petitioner was also personally liable because of having been the executor of the Estate.

(l) Petitioner, in order to eliminate or reduce his obligation for various alleged taxes as transferee of the Estate of L. K. Green and to eliminate or reduce his obligation with respect to additional income taxes on returns filed by him, and in order to conserve his estate and prevent it from being reduced by excessive and illegal taxes and resultant

interest, engaged legal and accounting services for such purposes. There was also traveling expense paid in connection with trips regarding tax matters, such trips being business trips and not personal pleasure trips.

(m) Petitioner was required by law to file an income tax return and, in order to know that such return for the year 1938 was properly prepared for filing in 1939, he engaged the services of a certified public accountant.

(n) During 1939 petitioner paid the following legal and accounting fees and sundry expenses:

Baird, Kurtz & Dobson, for services and expenses of
W. E. Baird:

For preparation of individual income tax returns for 1938	\$ 60.00
Portion of expenses in connection with trip to Cali- fornia for preparation of various income tax re- turns for 1938	5.00
One-half of fee for settling L. K. Green Estate matters	280.00
One-half of expenses of trip to Wichita, Kansas, regarding L. K. Green Estate tax matters, L. K. Green income tax matters, and individual income tax matters	7.60
Fee for Gift Tax Settlement and sundry other minor matters	40.00
A. Z. Patterson, legal fees and expenses.....	1,200.00
One-half traveling expenses from California to Kan- sas City regarding various tax matters	62.50
	<hr/>
	\$ 1,655.10
	<hr/>

[5]

The Commissioner disallowed the foregoing items aggregating \$1,655.10 which petitioner had deducted in his 1939 income tax return.

(o) For the year 1939, petitioner received a salary of \$12,000.00 as an official of a corporation, and also received some director's fees. One-half of such salary and fees was reported by petitioner and one-half by his wife, Mrs. Georgia M. Green. Petitioner also owned a considerable amount of stocks and bonds. He owned a small amount of oil royalties. He owned an interest in real estate in Canada, and also owned and operated an interest in real estate in California. Petitioner's gross income for 1939, exclusive of salary and exempt or partially exempt interest, was \$24,823.28.

(p) Petitioner subscribed for Babson's Financial Service Reports, and for the year 1939 paid \$180.00 for such service reports, which were an ordinary and necessary business expense for his business of managing his securities, from which he derived the greater portion of his income. Petitioner deducted the \$180.00 as an ordinary and necessary business expense. The Commissioner disallowed the deduction.

(q) For the protection and safe keeping of his various securities, petitioner rented a safety deposit box for the year 1939, and paid thereon rental of \$10.00 plus tax of \$1.00, which was an ordinary and necessary expense in connection with the management of his securities. Petitioner deducted the \$11.10 as an ordinary and necessary business expense. The Commissioner disallowed \$10.00.

(r) In the shipping of such securities, petitioner incurred and paid during 1939 expense in the amount of \$2.02, which the petitioner deducted as an ordinary and necessary business expense in con-

nection with the management of his securities. The Commissioner did not disallow this deduction. [6]

(s) Domestic corporations which engage the services of lawyers and accountants and have sundry expenses in connection with preparation of income tax returns or in connection with the protest and appeal of tax matters are allowed by the Commissioner to deduct such expenses as ordinary and necessary expenses paid or incurred in carrying on any trade or business. Also, domestic corporations which are investors in securities and pay expenses for financial services and rental of safety deposit boxes for the safe keeping of such securities are allowed by the Commissioner to deduct such expenses as ordinary and necessary expenses paid or incurred in carrying on a trade or business.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that the interest in controversy, in the amount of \$4,143.01, was paid by the petitioner on his obligation and should be allowed as a deduction; also that there should be no discrimination between an individual and a corporate taxpayer in allowing deductions under Section 23(a) of the Internal Revenue Code, and that the legal, accounting, and other expenses, including cost of financial service reports and safety deposit box rental, should be allowed petitioner as a deduction; and that \$646.27 of the deficiency as

determined by the Commissioner should be disallowed.

W. E. BAIRD, C. P. A.
Counsel for Petitioner
701 Fidelity Building
Kansas City, Missouri

(Duly Verified.) [7]

EXHIBIT "A"

Form 1230

Treasury Department
Internal Revenue Service
12th Floor,
U. S. Post Office and Court House
Los Angeles, California

Office of
Internal Revenue Agent
in Charge
Los Angeles Division
LA:IT:90D:PB

SN-IT-1

Aug. 16, 1941

Mr. Lawrence R. Green
2440 Pine Street
San Diego, California

Sir:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1939 discloses a deficiency of \$728.18 as shown in the statement attached.

In accordance with the provisions of existing in-

ternal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING

Commissioner,

By R. B. SULLIVAN

Internal Revenue Agent

Enclosures:

Statement

Form of waiver. [9]

STATEMENT

LA:IT:90D:PB

Mr. Lawrence R. Green

2440 Pine Street

San Diego, California

Tax Liability for the Taxable Year Ended

December 31, 1939

	Liability	Assessed	Deficiency
Income Tax	\$ 1,063.75	\$335.57	\$728.18

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated March 4, 1941 and to your protest dated May 16, 1941.

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition the United States Board of Tax Appeals for a re-determination of the deficiency.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....	\$	6,676.29
Additional income and unallowable deductions:		
(a) Dividends received	\$	523.05
(b) Interest received		335.00
(c) Capital gain		55.83
(d) Interest disallowed		4,143.01
(e) "Other deductions" disallowed..		1,845.10
		6,901.99
Net income adjusted	\$	13,578.28

EXPLANATION OF ADJUSTMENTS

(a) and (b) The amounts of dividends received and interest received on corporation bonds are understated in your return \$523.05 and \$335.00, respectively.

(c) You have included in income in your return \$167.50 of \$335.00 gain realized from the sale of Memphis Power and Light Company preferred stock held for more than 18 months but not for more than 24 months. Under the provisions of section 117(b) of the Internal Revenue Code 66-2/3 per centum of the gain of \$335.00 is to be taken into account, and therefore an addition to income is made in the amount of \$55.83.

(d) The deduction of \$4,143.01 claimed for "interest on deficiency of estate taxes—Estate of L. K. Green" is not allowable under the provisions of section 23(b) of the Internal Revenue Code.

(e) The following deductions claimed on line 18 of your return are disallowed because they do not constitute expenses of carrying on a trade or business within the meaning of section 23(a) of the Internal Revenue Code:

Legal and accounting, including estate tax, gift tax and other old tax matters.....	\$1,655.10
Financial report service—Babson	180.00
Rent of safety deposit box	10.00
Total.....	\$1,845.10

COMPUTATION OF TAX

Net income adjusted	\$ 13,578.28
Less: Personal exemption (claimed by wife)	
Balance (surtax net income).....	\$ 13,578.28
Less: Earned income credit	604.75
<hr/>	
Net Income subject to normal tax.....	\$ 12,973.53
Normal tax at 4% on \$12,973.53.....	\$ 518.94
Surtax on \$13,578.28.....	566.26
<hr/>	
Total Tax	\$ 1,085.20
Less: Income Tax paid at the source.....	21.45
<hr/>	
Correct income tax liability.....	\$ 1,063.75
Income tax assessed:	
Original, account No. 201141	335.57
<hr/>	
Deficiency of income tax	\$ 728.18
 [Endorsed]: U. S. B. T. A. Filed Nov. 12, 1941.	
<div style="text-align: right;">[12]</div>	

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income and surtaxes for the calendar year 1939; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraphs (a), (b), and (c) of paragraph 4 of the petition.

5. (a), (b), and (c) Admits the allegations contained in subparagraphs (a), (b), and (c) of paragraph 5 of the petition.

(d) to (m), inclusive. Denies the allegations contained in subparagraphs (d) to (m), inclusive, of paragraph 5 of the petition. [13]

(n) Admits that the petitioner paid out the sums totaling \$1,655.10, but denies that such sums constitute sundry expenses. Admits that the Commissioner disallowed the items aggregating \$1,655.10 which petitioner had deducted in his 1939 income tax return, denies the remainder of the allegations contained in subparagraph (n) of paragraph 5 of the petition.

(o) Admits that the petitioner received a salary of \$12,000.00 as an official of a corporation, denies the remainder of the allegations contained in subparagraph (o) of paragraph 5 of the petition.

(p) Admits that the petitioner subscribed for and paid \$180.00 during the year 1939 for Babson's Financial Service Reports and that he deducted said sum as an ordinary and necessary expense and that the Commissioner disallowed the said deduction, denies the remainder of the allegations contained in subparagraph (p) of paragraph 5 of the petition.

(q) Admits that the petitioner paid \$10.00 for rental of a safety deposit box and claims said deduction as an ordinary and necessary expense which was

disallowed by the Commissioner, denies the remainder of the allegations contained in subparagraph (q) of paragraph 5 of the petition.

(r) and (s) Denies the allegations contained in subparagraphs (r) and (s) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied. [14]

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
Division Counsel.
FRANK T. HORNER,
E. A. TONJES,
Special Attorneys,
Bureau of Internal Revenue.

BAT/mm 12/24/41

[Endorsed]: U.S.B.T.A. Filed Dec. 31, 1941. [15]

[Title of Tax Court and Cause.]

AMENDED PETITION

Comes now the petitioner by his counsel, W. E. Baird, and moves the Court that he be allowed to amend his petition with respect to pleading of er-

rors by the addition of another allegation of error 4(d) as stated below.

The allegations of error as amended will then be as follows:

4 (a) Commissioner erred in determining that interest in the amount of \$4,143.01, paid by the petitioner in satisfaction of his obligation arising from being a transferee and/or executor of the Estate of L. K. Green, was not an allowable deduction from gross income.

4(b) Commissioner erred in determining that legal, accounting and sundry other expenses amounting to \$1,655.10, paid by petitioner in connection with various taxes and other business matters, was not an allowable deduction from gross income.

4 (c) Commissioner erred in determining that the expense of Babson's Financial Service Reports, \$180.00, and rental of a safety deposit box, \$10.00, paid by petitioner, was not an allowable [16] deduction from gross income.

4 (d) Commissioner erred in including in gross income of petitioner the amount of \$4,143.01, being a portion of the income received by petitioner arising from property transferred to him as residuary beneficiary of the Estate of L. K. Green.

W. E. BAIRD,

Counsel for Petitioner,
701 Fidelity Building,
Kansas City, Missouri.

[Endorsed]: T.C.U.S. Filed Nov. 3, 1942. [17]

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed in the above-entitled proceeding denies as follows:

4 (a) to (d), inclusive. Denies the allegations of error contained in subparagraphs (a) to (d), inclusive, of paragraph 4 of the amended petition.

Denies generally and specifically each and every allegation set forth in the amended petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved.

J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

W. FRANK GIBBS,

Division Counsel.

ANGUS ROY SHANNON, JR.,

Special Attorney,

Bureau of Internal Revenue.

ARS:fmh 12-7-42. [18]

[Title of Tax Court and Cause.]

Docket Nos. 108546, 109145. Promulgated January 19, 1944.

Upon settlement of their father's estate in 1931, the petitioners, as distributees, each received one-half of the residuary estate. Several years later the respondent determined a deficiency in estate tax against the said estate, which with the interest thereon was paid in equal amounts by the petitioners in 1939. Petitioner Ralph J. Green similarly paid in 1939 a deficiency with interest thereon in the estate tax of his deceased wife, he having received in a prior year, as beneficiary of her estate, one-fourth of the assets. Held, that such parts of the interest on the said estate tax deficiencies as accrued from the dates of distribution and were paid by the petitioners in 1939 are deductible from gross income under section 23 (b) of the Revenue Act of 1938 in computing petitioners' net incomes.

During 1939 the petitioners paid legal and accounting fees and sundry expenses in connection with matters of taxation. Held, that the amounts are not legal deductions from gross income. [19]

W. E. Baird, C.P.A., for the petitioners.

Angus R. Shannon, Jr., Esq., for the respondent.

OPINION

Smith, Judge: These proceedings, which were consolidated for hearing, are for the redetermination of deficiencies in income tax for the year 1939

of \$1,201.94 in the case of Ralph J. Green, and \$728.18 in the case of Lawrence R. Green. In the petition filed by the former, it is alleged that the respondent erred in disallowing the deduction from gross income of (1) \$4,143 interest paid in satisfaction of his obligation, as a transferee, to pay a deficiency in estate tax on the estate of his deceased father, which had been distributed to him and his brother Lawrence in equal shares in 1931; (2) \$245.85 interest paid in satisfaction of his obligation, as transferee, to pay a deficiency in estate tax on the estate of his deceased wife; (3) \$1,679.37 paid "in connection with various taxes and other business matters"; and (4) \$18.37 for rent of a safety deposit box and sundry expenses with respect to securities.

The allegations of error in the petition of Lawrence R. Green are the same as (1), (3) and (4) above, except that the amounts are \$4,143.01, \$1,655.10 and \$190, respectively, the last named item representing \$180 paid for Babson's Financial Service Reports and \$10 rental for a safety deposit box.

By amendments to the petitions, it is claimed that if petitioners are not entitled to deduct interest paid by them upon the deficiency in estate tax on the estate of their father, then they erred in including in gross income for 1939 an amount equal to the interest disallowed as a deduction.

The respondent concedes error as to his disallowance of the deduction of \$18.37, represented by allegation (4) above, in the case of Ralph J. Green, and of \$190 in the case of Lawrence R. Green. [20]

The facts are found as stipulated by the parties, such stipulation of facts being incorporated herein by reference.

The petitioners are brothers. Ralph Green resides in Warrensburg, Missouri. He filed his income tax return for 1939 with the Collector of Internal Revenue for the Sixth Collection District of Missouri. Lawrence Green resides in San Diego, California. He filed his income tax return for 1939 with the Collector of Internal Revenue for the Sixth Collection District of California. Both returns were made on the cash receipts and disbursements basis.

The petitioners' father, L. K. Green, died on July 5, 1930, leaving a will making the petitioners the two and only residuary beneficiaries of his estate. They shared equally in their father's estate. Lawrence Green was duly appointed, qualified and acted as executor. A Federal estate tax return was duly prepared and filed for the estate, and the tax shown to be due thereon was duly paid.

The estate of L. K. Green was probated in Johnson County, Kansas. The final report of the executor was filed on September 4, 1931, showing that all specific bequests had been paid and asking for an order for final distribution to the residuary beneficiaries and discharge of the executor. The final distribution was accomplished, and on October 13, 1931, the executor was discharged and given full and complete release. No assets were retained in the estate.

Subsequent to the final settlement of the estate on October 13, 1931, the respondent determined a deficiency in estate tax against the Estate of L. K. Green. The matter was finally settled by the petitioners paying, in 1939, an estate tax deficiency in the amount of \$17,244.81, together with interest as provided by law in the amount of \$8,286.01. The petitioners [21] each paid one-half of the deficiency and interest thereon, the said interest being computed to July 8, 1939.

Nelle M. Green, wife of Ralph Green, died on November 16, 1935. Ralph Green was beneficiary of his wife's estate and received one-fourth of the assets of the estate upon distribution. A Federal estate tax return was duly prepared and filed for the Estate of Nelle M. Green, and the tax shown to be due thereon was duly paid. On or about March 30, 1937, all of the assets of the estate, with the exception of \$136.27, were distributed by the executor of the said estate. Subsequent to March 30, 1937, the respondent determined a deficiency in estate tax against the Estate of Nelle M. Green. The matter was finally settled by Ralph Green furnishing the funds to pay the deficiency in estate tax in the amount of \$1,714.41, together with interest as provided by law in the amount of \$245.85. The payment of the deficiency and the designated interest was made during the calendar year 1939.

The amounts distributed to and received by the petitioners from the estate of their father, and the amount distributed to and received by Ralph Green from the estate of his deceased wife, were greatly

in excess of the amounts of designated interest paid by each petitioner on the deficiencies in estate tax of the respective estates, and there is no claim, nor is there any suggestion of claim, that the amounts so received by the petitioners from the said estates did not also exceed the tax and the interest so paid.

In their respective income tax returns for 1939, the petitioners each deducted from gross income the amount of \$4,143, designated as interest paid on the estate tax deficiency of their father's estate. In addition, Ralph [22] Green deducted from income \$245.85, designated as interest paid on the estate tax deficiency of his wife's estate. The respondent disallowed these deductions in his determination of the deficiencies herein.

During 1939, Ralph Green received a salary of \$12,000 as an officer of a corporation, and also received interest and dividends from a considerable amount of bonds and stocks owned by him. He was also a partner in a retail store, owned a small amount of oil royalties, and owned an interest in certain real estate located in Canada and in California.

During 1939, Lawrence Green received a salary of \$12,000 as an officer of a corporation, and also some fees as director. One-half of such salary and fees was reported by petitioner and one-half by his wife, Georgia M. Green. He also owned a considerable amount of stocks and bonds, a small amount of oil royalties, and an interest in certain real estate located in Canada and in California.

It was the practice of the petitioners during 1939, and also during prior years, to consult with their accountant or attorney for advice and assistance regarding various matters of taxation.

During 1939, Ralph Green paid the following legal and accounting fees and sundry expenses in connection with matters of taxation: [23]

Baird, Kurtz & Dobson, for services and expenses of

W. E. Baird:

For preparation of Federal and state income tax returns for 1938	\$ 70.00
Portion of expenses in connection with trip to California in connection with preparation of income tax returns for 1938	5.00
One-half of fee for settling estate tax matters re estate of L. K. Green	280.00
One-half of expenses of trip to Wichita, Kansas, for conference regarding estate and income tax matters re estate of L. K. Green and individual income tax matters	7.60
Fee for gift tax settlement and sundry other minor accounting and tax matters	40.00
A. Z. Patterson—legal fees and expenses with respect to various tax matters	1,212.25
One-half traveling expenses from California to Kansas City regarding various tax matters.....	62.50
Expense shipping securities	2.02
	<hr/>
	\$1,679.37

The respondent disallowed all of the foregoing items, aggregating \$1,679.37, which Ralph Green had deducted in his 1939 income tax return.

During 1939, Lawrence Green paid the following legal and accounting fees and sundry expenses in connection with matters of taxation: [24]

Baird, Kurtz & Dobson, for services and expenses of
W. E. Baird:

For preparation of individual income tax returns for 1938	\$ 60.00
Portion of expenses in connection with trip to Cali- fornia for preparation of various income tax re- turns for 1938	5.00
One-half of fee for settling L. K. Green estate mat- ters	286.00
One-half of expenses of trip to Wichita, Kansas, re- garding L. K. Green estate tax matters, L. K. Green income tax matters, and individual income tax matters	7.60
Fee for gift tax settlement and sundry other minor matters	40.00
A. Z. Patterson: legal fees and expenses.....	1,200.00
One-half traveling expenses from California to Kansas City regarding various tax matters.....	62.50
	<hr/>
	\$1,655.10

The respondent disallowed all of the foregoing items, aggregating \$1,655.10, which Lawrence Green had deducted in his 1939 income tax return.

The first question presented is whether that part of the amount paid by petitioners as transferees of their father's estate, and by Ralph Green as transferee of his wife's estate, which represented interest on the estate tax deficiencies of those estates was to the petitioners interest, deductible under section 23 (b) of the Internal Revenue Code for the purpose of computing their net income. [25]

The petitioners were the residuary legatees of the estate of their father and as such legatees had, prior to 1939, received distribution of the residuary estate equally between them. Ralph Green had in a prior

year, and as beneficiary, received one-fourth of the assets of the estate of his wife. After such distribution the estate had assets of only \$136.27. Accordingly, the petitioners were transferees of the respective estates and in making payment of the estate tax deficiencies and the interest thereon they were responding to their liability for the estate tax and interest of the estate of their father and, in the case of Ralph Green, of his wife also.

Section 900 (a) of the Internal Revenue Code provides in part as follows:

Sec. 900. Transferred Assets.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this subchapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a decedent, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this subchapter.

Section 23 I.R.C. provides for the deduction from gross income of “(b) *Interest.*—All interest paid or accrued within the taxable year on indebtedness.”

The question here is whether the entire amount or any part of the interest paid by the petitioners upon the deficiencies in estate tax was paid on indebtedness.

The law is well established that in order for interest to be deductible from gross income it must be paid upon a debt owed by the payor. See William H. Simon, 36 B.T.A. 184, and cases therein cited. In *Scripps v. Commissioner* (C.C.A., 6th Cir.), 96 Fed. (2d) 492; 21 A.F.T.R. 130, the [26] question before the court was whether a trust estate which had been created by the decedent prior to his death, and which was charged with the payment of the estate tax, was entitled to deduct from its gross income the estate tax and interest paid thereon. The Board held, 33 B.T.A. 963, that the estate tax paid was not deductible. The United States Circuit Court sustained the Board in holding that the estate tax paid could not be deducted but held that the interest paid thereon could be deducted. The court held:

* * * Section 23 (b) provides that in computing net income there shall be allowed as deductions all interest paid or accrued within the taxable year on indebtedness. There is here no express limitation upon the character of the taxable entity claiming the deduction. It is true, of course, that there is an implied limitation, and that the indebtedness must be the taxpayer's indebtedness, not that of someone else. But we have no difficulty in concluding that the interest paid by the trust was interest upon its

indebtedness, and this without regard to whether its obligation was a primary or a secondary obligation. The liability was specifically imposed upon it by the taxing law, and its property was subject to government lien. Section 315 (a) (b), 44 Stat. 80. Had it borrowed the money with which to pay the tax there would then have been no question of its right to deduct interest upon the indebtedness. We see no question of that right in the present situation. * * *

Consonant therewith see *Penrose v. United States*, 18 Fed. Supp. 413.

The respondent in making his argument herein relies principally upon *Helen B. Sulzberger*, 33 B.T.A. 1093; *Inez H. Brown*, 1 T.C. 225; and *Jones v. Hassett*, 45 Fed. Supp. 195.

It is true, of course, that a person paying interest upon the indebtedness of another as a volunteer is not entitled to deduct from his gross income the interest paid. He is not paying interest upon his own indebtedness.

Those are not the facts here. The petitioners as transferees of the decedents' estates had a liability for the payment of the deficiencies in [27] estate tax together with interest thereon. A man who has a liability for a debt and pays it is in the same position as the principal debtor. When he pays interest which is accrued upon the debt from the time that he steps into the shoes of the principal debtor he is paying interest upon his own debt. An estate

in process of administration is entitled to deduct from the gross income of the estate the interest paid upon the estate tax. I.T. 1317; C.B. I-1; p. 132.

Any doubt relative to the right of a transferee to deduct the portion of the interest paid by him upon a deficiency in a tax imposed by the transferor appears to be dispelled by a consideration of the legislative history which led to the enactment of section 280 and section 316 (a) of the Revenue Act of 1926. These provisions of the 1926 law provided for the assessment and collection of taxes and deficiencies in tax due from transferees. In the Senate Finance Committee Report (69th Cong., 1st Sess., S. Rept. 52), it was said:

The liability which arises in the transferee in respect of the receipt of the assets is normally to be measured by the liability of the transferor at the time of the transfer. This would include the amount of the tax due plus all interest, additional amounts, and additions to the tax provided by law, up to the time of such transfer. The section, however, provides that the liability of the transferee in this amount shall not in turn be subject to interest, additional amounts, or additions to tax, save that in case the transferee petitions the board for a re-determination of its liability, the amount so determined shall draw interest at the rate of 1 per centum a month commencing with notice and demand for payment following final decision of the board.

The law as drafted by the Senate Finance Committee was changed in conference to provide the same as section 900 I.R.C. The Conference Committee Report (69th Cong., 1st Sess., H. Rept., 356), states: [28]

Under the amendment the liability of the taxpayer for the tax, including all interest and penalties, is fixed as of the time of the transfer of the assets. No further interest subsequently accrues upon such liability as assumed by the transferee except the interest under section 276 (b) and (c) for failure to pay upon notice and demand after the outlined procedure has been completed and interest at 6 percent a year for reimbursing the Government at the usual rate for loss of the use of money due it. * * *

From the foregoing we think it clear that the petitioners are not entitled to deduct such portions of the interest which accrued upon taxes of the estates of the decedents prior to distribution. That interest accrued upon an indebtedness of the estates. The petitioners received the distributions from the estates subject to a charge for interest accrued to the dates of transfer. We think it equally clear that the interest which accrued upon the estate tax deficiencies after distribution of the estates accrued upon indebtedness of the petitioners. They are entitled to deduct from their gross incomes the amount of such interest paid by them on the estate tax deficiencies of the two estates. The rule herein announced is consonant with that enunciated in *Harvey M. Toy*, 34 B.T.A. 877.

To the extent that the opinion of the Board in *Helen B. Sulzberger*, *supra*, denies a distributee of the assets of an estate the right to deduct the interest which accrues upon a tax deficiency of the estate from the date of distribution, and which he pays in satisfaction of his personal liability, it will not be followed hereafter. [29]

The second question presented is whether the petitioners are entitled to deduct from gross income certain legal and accounting fees and sundry expenses in connection with matters of taxation. The petitioners submit that a corporation paying such expenses would be entitled to deduct them and that no distinction in this regard should be made between a corporation and an individual.

Section 23(a) of the Revenue Act of 1938 has been amended by section 121 of the Revenue Act of 1942 to permit the deduction from gross income of:

(1) Trade or Business Expenses.

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.

* * * * *

(2) Non-Trade or Non-Business Expenses.—

In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

Quite clearly the expenses here in question were not paid or incurred in connection with the carrying on of a trade or business. If deductible from gross income, they must be deducted under "Non-Trade or Non-Business Expenses," provided for by subsection (2) of section 23 (a), as amended. [30]

It should be noted that the deduction of non-trade or non-business expenses is held within certain definite limits. To be deductible, they must be (1) "ordinary and necessary"; (2) "for the production or collection of income"; or (3) "for the management, conservation, or maintenance of property held for the production of income." We do not think that the expenditures which the petitioners claim as deductions from gross income fall within classification (2) or (3). The respondent has interpreted this new provision of the Revenue Act of 1942, which admittedly applies to the petitioners for the taxable year 1939, by Treasury Decision 5196, promulgated December 8, 1942, wherein it is stated:

* * * Expenditures incurred in protecting or asserting one's rights to property of a decedent as heir or legatee, or as beneficiary under a testamentary trust, are not deductible expenses. Expenditures incurred for the purpose of preparing tax returns (except to the extent such returns relate to taxes on property held for the production of income), for the purpose of recovering taxes (other than recoveries required to be included in income), or for the purpose of *resiting* a proposed additional assessment of taxes (other than taxes on property held for the

production of income) are not deductible expenses under this section, except that part thereof which the taxpayer clearly shows to be properly allocable to the recovery of interest required to be included in income.

The respondent's disallowance as deductions of \$1,679.37 of expenses described above in the case of petitioner Ralph J. Green and of \$1,655.10 in the case of petitioner Lawrence R. Green is accordingly sustained.

Reviewed by the Court.

Decisions will be entered under Rule 50. [31]

Turner, J., dissenting: That portion of the majority opinion allowing the petitioners to deduct that part of the liability of their father's estate, and in the case of Ralph Green, of his wife's estate, which represents interest accrued on the estate tax deficiencies of the said estates from and after the dates the assets thereof were distributed to them as beneficiaries is in my opinion contrary to the law and the facts, and for that reason I note my dissent. The petitioners were the residuary legatees of the estate of their father and as such legatees had received distribution of the residuary estate equally between them. Ralph Green was a beneficiary of his wife's estate and as such beneficiary had received one-fourth of the assets of her estate. Accordingly the petitioners were transferees of the respective estates, and in making payment of the estate tax deficiencies and interest thereon, they were responding to their liability in equity for the estate tax and

interest of the said estates. Section 900 (a) (1) of the Internal Revenue Code. The property so received from the said estates was received without cost or charge, and there is no claim or suggestion that it was not sufficient in each instance to cover the amount of the tax and the interest thereafter paid. It came to them charged not only with liability for the deficiencies in tax, but for interest collectible "as a part of the tax," at the rate of 6 per cent per annum from the due date of the tax to the date of assessment of the deficiency. Section 891 of the Internal Revenue Code. I have been able to find no provision of statute and know of no rule whereunder or whereby an estate may stop the running of interest against it and on its tax by distribution of its assets, and there [32] is no basis here for any claim that interest other than that imposed by section 891, *supra*, was charged or paid. There was no charge of interest *qua* interest against the petitioners, and to the extent of the tax and interest paid they were merely accounting to the Federal Government, creditor of the two estates, for property received under mistake of fact as their own. Through the property received the petitioners had already been secured or indemnified for the full liability they were required to pay and were actually out of pocket nothing, the net amount of their bequests merely having been fixed by the said payments. They have made no payment of interest *qua* interest, and their claim for the deduction of interest should in my opinion be denied. Helen B. Sulzberger, 33 B. T. A. 1093, and Inez H. Brown, 1 T.

C. 225. See and compare William H. Simon, 36 B. T. A. 184; Charles R. Holden, 27 B. T. A., 530; and Jones v. Hassett, 45 Fed. Supp. 195. For a more extended discussion of my views concerning the equity liability of transferees and the nature or character of payments made thereunder, and for comment on the Congressional Committee Reports cited and relied on in the majority opinion, reference is made to my dissent in Koppers Co., 3 T. C. (promulgated this date).

In stating that the rule announced in the instant case is consonant with that enunciated in Harvey M. Toy, 34 B. T. A. 877, the majority has ignored the distinction specifically drawn in the Toy case between the case there decided and a case such as we have here. The liability asserted and paid and in respect of which deduction was claimed in the Toy case was directly imposed by statute, section 3467 of the Revised Statutes, and bottomed solely on the wrongful act of the party charged, while here the [33] liability is a liability to respond in trust as a transferee or distributee of property, not for a liability of the transferee, but for a liability of the transferor. In my own mind there is grave doubt as to the soundness of the conclusion reached in the Toy case and that it may properly be said that any part of an amount paid under section 3467, *supra*, constituted the payment of interest. Certainly a very persuasive argument can be made that the liability paid was in the nature of a penalty for the wrongful act of a fiduciary in making distribution of a

trust estate before satisfying the liability of the estate to the Government for tax and interest, and that such tax and interest is merely the measure of the penalty imposed and not as to the fiduciary tax and interest. Regardless, however, of the soundness of the *Toy* case, it does not decide or stand for the proposition decided in the instant case.

Similarly, *Scripps v. Commissioner*, 96 Fed. (2d) 492, and *Penrose v. United States*, 18 Fed. Supp. 413, do not stand for the proposition here decided, but if in point at all, are in part, at least, directly contrary. Under the rule enunciated in the *Penrose* case, the petitioners are entitled to deduct as their interest the entire amount of interest charged and paid on the estate tax deficiencies and are not limited to interest accrued before the distribution of the assets of the estates, as the majority here holds. The *Scripps* case, if in point at all, is also authority for the deduction of the interest in full. It is to be noted also that the estate tax and interest were paid by an inter vivos trust, created prior to the death of the decedent, and that the liability was statutory and not a liability in equity. [34]

In the case of *Ralph Green*, it would seem that only a part of the interest deduction claimed should be allowed, even under the theory of the majority opinion. The facts show that as beneficiary of his wife's estate he was entitled to receive and did actually so receive only one-fourth of the assets. There is no showing that he was ever charged with any amount as transferee, the recitation in the report being that a deficiency was determined against the

estate of Nelle M. Green and "the matter was finally settled by Ralph Green furnishing the funds" to pay the deficiency and interest. The majority opinion allows him to deduct as his interest the full amount of the interest which accrued on the estate tax from and after the date he, as beneficiary of the estate, received one-fourth of its assets. His ultimate liability to pay the amount of such interest was only one-fourth thereof. Such being the facts, it would seem to me that as to the other three-fourths it must necessarily be concluded that the payment was a voluntary payment of the interest of another, for which no deduction is allowable. *Colston v. Burnet*, 59 Fed. (2d) 867, and *William H. Simon*, *supra*.

Kern, J., agrees with this dissent. [35]

Disney, J., dissenting: I can not agree with the view expressed in the majority opinion. There being no personal liability upon the taxpayer for the tax involved, I do not think that section 23 (b) of the Internal Revenue Code encompasses the deduction approved by the majority. My views are more fully expressed in my dissent in *Koppers Company*, 2 T. C.(promulgated this date), and reference is made to the decision of the Circuit Court of Appeals for the Tenth Circuit on November 8, 1943, in *Koch et al, v. United States*, Fed. (2d), denying the deduction under facts essentially the same in principle as those here involved. I therefore respectfully dissent.

Black and Kern, J. J., agree with this dissent.

[36]

The Tax Court of the United States
Washington

Docket No. 109145

LAWRENCE R. GREEN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Opinion, promulgated January 19, 1944, the parties herein having filed an agreed recomputation of tax on February 12, 1944, it is

Ordered and Decided: That there is a deficiency in income tax of \$177.48 for the calendar year 1939.

Enter.

(Signed) CHARLES P. SMITH
Judge.

Entered Feb. 16, 1944 [37]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by counsel for the respective parties in the above-entitled proceedings that said proceedings may be consolidated for the purpose of trial and opinion. It is further stipulated and agreed that the following facts are to be taken as true, subject to the right of either party

to introduce further evidence and testimony not inconsistent with the facts herein stipulated:

1. Petitioners are individuals and native-born citizens of the United States. Petitioner Ralph J. Green, Docket No. 108546, resides at Warrensburg, Missouri, and filed his individual Federal income tax return for the calendar year 1939 with the collector of internal revenue for the Sixth District of Missouri at Kansas City, Missouri. Petitioner Lawrence R. Green, Docket No. 109145, resides at 2440 Pine Street, San Diego, California, and filed his individual Federal income tax return for the calendar year 1939 with the collector of internal revenue for the Sixth District of California. Both of the above returns were made and filed on the cash receipts and disbursements basis. [38] During 1939 petitioners were under no statutory disability to prevent their entering into and carrying on any business of a legal nature.

2. One L. K. Green, deceased, father of the petitioners herein, died July 5, 1930, leaving a will making petitioners the two and only residuary beneficiaries of his estate. The two brothers shared equally in their father's estate. Petitioner Lawrence R. Green was duly appointed, qualified, and acted as executor of the L. K. Green Estate. A Federal estate tax return for the estate of L. K. Green was duly prepared and filed, and the tax shown thereon was paid.

3. The estate of L. K. Green was probated in Johnson County, Kansas. Final report of executor was filed as of September 4, 1931, showing all spe-

cific bequests having been paid and asking for order for final distribution to residuary beneficiaries and discharge of executor. The final distribution was accomplished, and on October 13, 1931, the executor of the estate of L. K. Green was discharged and given full and complete release. No assets were retained in the estate.

4. Subsequent to the final settlement of the estate of L. K. Green on October 13, 1931, in the Probate Court of Johnson County, Kansas, the Commissioner of Internal Revenue asserted a deficiency in tax against said estate. The matter was finally settled by the residuary legatees of the estate (petitioners herein) paying an estate tax deficiency in the amount of \$17,244.81 plus interest as provided by law in the amount of \$8,286.01. Petitioners each paid one half of [39] the asserted deficiency and interest thereon during the calendar year 1939. The interest was computed to July 8, 1939. The above deficiency as finally agreed upon was considerably less than that originally determined by the Commissioner.

5. One Nelle M. Green, deceased, wife of petitioner Ralph J. Green, died November 16, 1935. Petitioner Ralph J. Green was a beneficiary of the estate of Nelle M. Green and received one fourth of the assets of the estate upon distribution. The estate of Nelle M. Green was probated in Jackson County, Missouri. A Federal estate tax return for the estate of Nelle M. Green was duly prepared and filed and the tax shown thereon was paid. On or

about March 30, 1937, all of the assets of the estate, with the exception of \$136.27, were distributed by the executor of the estate. On or about May 6, 1940, final settlement of the estate was made in the probate court and the executor was discharged and given full and complete release.

6. In their respective income tax returns filed for the calendar year 1939, petitioners each deducted from income the amount of \$4,143.00, designated as interest paid on the deficiency in estate tax of the estate of L. K. Green, heretofore mentioned in paragraph 4 hereof. In addition, petitioner Ralph J. Green deducted from income the amount of \$245.85, designated as interest paid on the deficiency in estate tax of the estate of Nelle M. Green heretofore mentioned in paragraph 5 hereof. The Commissioner disallowed the deductions as claimed.

7. The amounts distributed to and received by petitioners, Ralph J. Green and Lawrence R. Green, from the estate of L. K. Green, and [40] the amount distributed and received by Lawrence R. Green from the estate of Nelle M. Green, were greatly in excess of the amounts of designated interest paid by each petitioner on the deficiencies in estate tax of the above estates.

8. The gross income received by each petitioner for the year 1939 from properties received from the estate of L. K. Green or substitutions therefor was greatly in excess of the amount of designated interest paid by each with respect to the estate tax deficiency. The dividends received by each petitioner in 1939 from the capital stock of one corporation,

which was received by petitioners from their father's estate and was continuously held by him through 1939, was almost double the amounts of designated interest paid with respect to estate tax deficiency.

9. For 1939, petitioner Ralph J. Green received a salary of \$12,000.00 as an officer of a corporation. Petitioner Ralph J. Green also owned a considerable amount of stocks and bonds. He was also a partner in a retail store. He owned a small amount of oil royalties. He owned an interest in real estate in Canada and also owned and operated an interest in real estate in California. Petitioner Ralph J. Green's gross income for 1939 from such other sources, exclusive of salary and exempt or partially exempt interest, was \$32,463.20.

10. For the year 1939, petitioner Lawrence R. Green received a salary of \$12,000.00 as an official of a corporation and also received some director's fees. One half of such salary and fees was reported by petitioner and one half by his wife, Mrs. Georgia M. Green. Petitioner [41] Lawrence R. Green also owned a considerable amount of stocks and bonds. He owned a small amount of oil royalties. He owned an interest in real estate in Canada, and also owned and operated an interest in real estate in California. Petitioner Lawrence R. Green's gross income for 1939, exclusive of salary and exempt or partially exempt interest, was \$24,823.28.

11. It was the practice of petitioners during the year 1939 and also during prior years to refer to their accountant or attorney for advice and assistance regarding various matters of taxation.

12. During 1939 petitioner Ralph J. Green paid the following legal and accounting fees and sundry expenses in connection with matters of taxation:

Baird, Kurtz & Dobson, for services and expenses of
W. E. Baird:

For preparation of Federal and state income tax returns for 1938	\$ 70.00
Portion of expenses in connection with trip to California in connection with preparation of income tax returns for 1938	5.00
One half of fee for settling estate tax matters re estate of L. K. Green.....	280.00
One half of expenses of trip to Wichita, Kansas, for conference regarding estate and income tax matters re estate of L. K. Green and individual income tax matters	7.60
Fee for gift tax settlement and sundry other minor accounting and tax matters	40.00
A. Z. Patterson, legal fees and expenses with respect to various matters	1,212.25
One-half traveling expenses from California to Kansas City regarding various tax matters.....	62.50
Expense shipping securities	2.02
Total legal and accounting fees and expenses.....	<u>\$1,679.37</u>

[42]

The Commissioner disallowed the foregoing items aggregating \$1,679.37, which petitioner Ralph J. Green had deducted in his 1939 income tax return.

13. During 1939 petitioner Lawrence R. Green paid the following legal and accounting fees and sundry expenses in connection with matters of taxation:

Baird, Kurtz & Dobson, for services and expenses of
W. E. Baird:

For preparation of individual income tax returns for 1938	\$ 60.00
---	----------

Portion of expenses in connection with trip to California for preparation of various income tax returns for 1938	5.00
One half of fee for settling L. K. Green estate matters	280.00
One half of expenses of trip to Wichita, Kansas, regarding L. K. Green estate tax matters, L. K. Green income tax matters, and individual income tax matters	7.60
Fee for gift tax settlement and sundry other minor matters	40.00
A. Z. Patterson, legal fees and expenses	1,200.00
One half traveling expenses from California to Kansas City regarding various tax matters	62.50
	<hr/>
	\$1,655.10
	<hr/> <hr/>

The Commissioner disallowed the foregoing items aggregating \$1,655.10, which petitioner Lawrence R. Green had deducted in his 1939 income tax return.

14. Respondent concedes error as alleged in subparagraph (d) of paragraph 4 of the petition in Docket 108546 and as alleged in subparagraph (c) of paragraph 4 of the petition in Docket No. 109145.

W. E. BAIRD

Counsel for Petitioner.

(Signed) J. P. WENCHEL (WFG)

Chief Counsel,

Bureau of Internal Revenue.

[Endorsed]: T. C. U. S. Filed Nov. 3, 1942.

[43]

[Title of Tax Court and Cause.]

JOINT MOTION TO AMEND STIPULATION
OF FACTS

Come now the parties in the above-entitled proceedings and move for leave to amend the stipulation of facts heretofore filed by adding the following as paragraph 5 (a) thereto and making it a part thereof:

5 (a). Subsequent to March 30, 1937, the Commissioner asserted a deficiency in estate tax against the estate of Nelle M. Green. The matter was finally settled by petitioner Ralph J. Green furnishing the funds to pay a deficiency in estate tax of said estate in the amount of \$1,714.41 plus interest as provided by law in the amount of \$245.85. The payment of deficiency and designated interest was made during the calendar year 1939.

And for cause show that the above paragraph was inadvertently omitted in the preparation of the stipulation of facts finally agreed upon by the parties.

Wherefore, it is prayed that this motion be granted.

(Sgd) W. E. BAIRD

Counsel for Petitioners.

(Signed) J. P. WENCHEL (WFG)

Chief Counsel,

Bureau of Internal Revenue.

The Tax Court of the U. S. Granted Dec. 11, 1942.

(Signed) CHARLES P. SMITH

Judge.

[Endorsed]: T.C.U.S. Filed Dec. 11, 1942. [44]

JOINT EXHIBIT No. 2

Form 1040
Treasury Department
Internal Revenue Service

United States

INDIVIDUAL INCOME TAX RETURN—1939

For Net Incomes of More Than \$5,000 From Salaries,
Wages, Dividends, Interest, Annuities, and for In-
comes from Other Sources Regardless of Amounts.

(Auditor's Stamp)

..... OT

Assessment
2720

Tax\$79.91
Penalty
Interest\$ 7.24
Total\$87.15
Basis OA or RAR.....
Audited by Rev. Agt 19....
Unit No. It Ap 7
List Sept 19 41

For Calendar Year 1939

or fiscal year beginning....., 1939, and ended....., 1940

To be filed with the Collector of Internal Revenue for your
district not later than the 15th day of the third month
following the close of your taxable year.

Print Name and Address Plainly. (See Instruction C)

Lawrence R. Green
(Name) (Use given names of both husband and wife, if this
is a joint return)

Page..... Line.....

Sept 19 519027

[Stamped] : Illegible

Page 1

(Do not use these spaces)

File Code 1117

Serial No. 201141

District 6-Calif.

(Cashier's Stamp)

Received

With Remittance

Mar 14 1940

Coll. Int. Rev.

Cash Check M.O.

First Payment

\$83.90

vs. Lawrence R. Green

47

Joint Exhibit No. 2—(Continued)

Form 1040—(Cont'd)	Individual Income Tax Return—1939—(Cont'd)	Page 1—(Cont'd)
Item and Instruction No.		
INCOME		
1. Salaries and other compensation for personal services. (From Schedule A)	\$ 6,047.50	[Pencilled in margin]: 8
2. Dividends	17,956.20	4
3. Interest on bank deposits, notes, mortgages, etc.....	680.03	4
4. Interest on corporation bonds.....	4,356.25	2
5. Taxable interest on Government obligations, etc. (From Schedule B)	.....	6
6. Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses)..... (Furnish names and addresses)	.....	4
7. Income from fiduciaries. (Furnish names and addresses) :	.....	—
8. Rents and royalties. (From Schedule C).....	.....	6
9. Income (or loss) from business or profession. (From Schedule D).....	290.60	1
10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule F) .....	.....	4
(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule E)	494.65	
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G).....	260.00	

Joint Exhibit No. 2—(Continued)

Form 1040—(Cont'd)

Individual Income Tax Return—1939—(Cont'd)

Page 1—(Cont'd)

Item and
Instruction No.

INCOME—(Continued)

11. Other income (including income from annuities) (State nature).....	785.55
12. Total income in items 1 to 11. (Enter nontaxable income in Schedule I)	\$ 30,870.78✓

DEDUCTIONS

13. Contributions paid. (Explain in Schedule H).....	\$ 125.00
14. Interest. (Explain in Schedule H)	20,613.69
15. Taxes. (Explain in Schedule H)	1,603.93
16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Ex- plain in Schedule H) .....	.....
17. Bad debts. (Explain in Schedule H).....	.....
18. Other deductions authorized by law. (Explain in Schedule H).....	1,851.87
19. Total deductions in items 13 to 18.....	24,194.49✓
20. Net income (item 12 minus item 19).....	\$ 6,676.29✓

[Stamped on face of form]: Revenue Agent in Charge Received Jul 3 1940 Los Angeles Division.
 [Stamped on face of form]: Revenue Agent in Charge Received Jun 28 1941 Los Angeles Division.
 [Stamped on face of form]: Revenue Agent in Charge Received Sept 24 1941 Los Angeles Division.

Joint Exhibit No. 2—(Continued)

Page 1—(Cont'd)

Form 1040—(Cont'd) Individual Income Tax Return—1939—(Cont'd)

COMPUTATION OF TAX

Item and Instruction No.	Item and Instruction No.	
21. Net income (item 20 above).....	28. Normal tax (4% of item 27).....	\$6,676.29✓ \$ 242.86✓
22. Less: Personal exemption, (From Schedule J-1) \$.....	29. Surtax on item 24. (See In- struction 29)	113.81✓
23. Credit for dependents. (From Schedule J-2)	30. Total (item 28 plus item 29).....	\$ 356.67✓
24. Balance (surtax net income)	31. Total tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F).....	\$
25. Less: Interest on Govern- ment obligations, etc. (See Instruction 25).. 26. Earned income credit. (From Schedule K-1 or K-2)	32. Less: Income tax paid at source	\$21.10 ✓
27. Balance subject to normal tax	33. Income tax paid to a for- eign country of U. S. possession. (Attach Form 1116)	21.10✓
	34. Balance of tax (item 31 minus items 32 and 33)	*\$ 355.57✓

* Figures circled in pencil.

Note.—One form marked "Duplicate Copy" must be filed with this original return (\$5 will be assessed if duplicate copy is not filed.) [45]

Joint Exhibit No. 2—(Continued)

Form 1040—(Cont'd)

Individual Income Tax Return—1939—(Cont'd)

Page 2

Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES,
AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See Instruction 1)

[Followed by printed form not filled in]

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 6)

[Followed by printed form not filled in]

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 8)

[Followed by printed form not filled in]

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 9)

[Followed by printed form not filled in]

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED
IN SCHEDULES C, D, F, AND G

[Followed by printed form not filled in] [46]

Page 3

Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS.

(See Instruction 10)

[Followed by printed form not filled in]

Joint Exhibit No. 2—(Continued)

Form 1040—(Cont'd)

Individual Income Tax Return—1939—(Cont'd)

Page 3—(Cont'd)

SUMMARY OF CAPITAL NET GAINS OR LOSSES

[Followed by printed form not filled in]

COMPUTATION OF ALTERNATIVE TAX

(To be used only in the case of a net long-term capital gain or loss)

1. Net income (item 20, page 1). (See Instruction 10)	\$6,676.29√	7. Less: Interest on Government obligations, etc. (See Instruction 25)	\$
2. (a) Net long-term capital gain (item 10 (b), page 1)	260.00	8. Earned income credit. (From Schedule K-1 or K-2) (See Inst. 10)	604.75√ 604.75√
(b) Net long-term capital loss (item 10 (b), page 1) .....	.....	
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See Instruction 10)	\$6,416.29√	9. Balance subject to normal tax	\$5,811.54√
4. Less: Personal exemption. (From Schedule J-1)\$		10. Normal tax (4% of line 9)	\$232.46√
5. Credit for dependents. (From Schedule J-2)		11. Surtax on line 6. (See Instruction 29)	100.81
		12. Partial tax (line 10 plus line 11)	\$333.27√
		13. (a) 30% of net long-term capital gain (30% of line 2 (a))	78.00√
6. Balance (surtax net income)	\$6,416.29√		

Joint Exhibit No. 2—(Continued)

Form 1040—(Cont'd)

Individual Income Tax Return—1939—(Cont'd)

Page 3—(Cont'd)

Computation of Alternative Tax—(Continued)

13. (Continued)

(b) 30% of net long-term capital loss
(30% of line 2 (b)).....

16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter as item 31, page 1)

14. Alternative tax (line 12 plus line 13
(a) or line 12 minus line 13 (b))\$

(a) or line 12 minus line 13 (b)\$411.27✓

15. Total normal tax and surtax
(item 30, page 1)

Total normal tax and surtax	256.67
Item 30, page 1).....	\$335.57✓

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 10)

[Followed by printed form not filled in] [47]

Page 4

Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

[Followed by printed form not filled in]

Joint Exhibit No. 2—(Continued)

Form 1040—(Cont'd)

Individual Income Tax Return—1939—(Cont'd)

Page 4—(Cont'd)

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B.
(See Instruction G)

[Followed by printed form not filled in]

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23.
(See Instructions 22 and 23)

[Followed by printed form not filled in]

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 26)

(1) If your net income is \$3,000 or less, use only this part of schedule

(2) If your net income is more than \$3,000, use only this part of schedule

Net income (item 20, page 1).....\$.....	Earned net income (not more than \$14,000)	\$6,047.50
Earned income credit (10% of net income, above)	Net income (item 20, page 1).....	6,676.29
	Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300).....	604.75✓

QUESTIONS

1. State your principal occupation or profession:
Pres. West Missouri Power Co. & Investor.
2. Check whether you are a citizen (X) or a resident alien ().
3. If you filed a return for the preceding year, to which Collector's office was it sent? Los Angeles, Calif.
4. Are items of income or deductions of both husband and wife included in this return? No.
5. State (a) Name of husband or wife, if separate return was made: Mrs. Georgia M. Green.
- (b) Personal exemption, if any, claimed thereon: \$2,500.00
- (c) Collector's office to which it was sent: Los Angeles, Cal.
6. Check whether this return was prepared on the cash (X) or accrual () basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501? (Answer "yes" or "no") No. (If answer is "yes," attach statement required by Instruction J.)

Joint Exhibit No. 2—(Continued)

Form 1040—(Cont'd)

Individual Income Tax Return—1939—(Cont'd)

Page 4—(Cont'd)

AFFIDAVIT. (See Instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code, as amended, and the regulations issued under authority thereof.

Subscribed and sworn to by Lawrence R. Green
before me this 12th day of Mar., 1940.

LAWRENCE R. GREEN
(Signature) (See Instruction E)

(Seal)

L. H. VAELTZIE

Notary Public

(Signature and title of officer administering oath)

(Signature)

(If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a proper officer by the spouse preparing the return. If neither or both prepare the return, it must be sworn to by both spouses.)

A return made by an agent must be accompanied by power of attorney. (See Instruction E.)

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)
 I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 9th day
 of March, 1940.

(Seal)

RUTH SAUNDERS

Notary Public

(Signature and title of officer administering oath)

My Commission Expires March 4, 1942. [48]

.....

(Signature of person preparing the return)

W. E. BAIRD

(Signature of person preparing the return)

BAIRD KURTZ DOBSON

(Name of firm or employer, if any)

Joint Exhibit No. 2—(Continued)

LAWRENCE R. GREEN

INCOME AND EXPENSES—YEAR 1939

Income		
Salaries:		
West Missouri Power Company	\$ 12,000.00✓	
Directors' Fees	95.00	
Community Income	\$ 12,095.00	
One-half to Mrs. Georgia M. Green.....	6,047.50	\$ 6,047.50✓
Dividends Received (Schedule)		17,956.20✓
Interest Received—Sundry (Schedule)		680.03✓
Interest Received—Corporate Bonds:		
Sundry (Schedule)	\$ 3,301.25✓	
2% Tax Free Covenant (Schedule).....	1,055.00✓	4,356.25
Interest Received—Exempt (Schedule)	\$ 2,232.63	
Oil Royalties	\$ 400.82	
Less: Depletion 27½%	110.22	290.60
Income from Vancouver Tourist Camp.....	\$ 678.86	
Income from Park Hill Property.....	106.69	785.55

Joint Exhibit No. 2—(Continued)

Lawrence R. Green—Income and Expenses—Year 1939—(Continued)

Net Short-Term Capital Gain (Schedule).....	494.65
Net Long-Term Capital Gain (Schedule).....	260.00

Total Income

Deductions (Schedule)

Net Income

\$ 30,870.78
24,194.49
\$ 6,676.29✓

[49]

LAWRENCE R. GREEN

DEDUCTIONS—YEAR 1939

Contributions	
San Diego Y. M. C. A.....	\$ 50.00
American Red Cross	25.00
Congregational Church	25.00
Home Missions of Congregational & Christian Churches.....	25.00

\$ 125.00

Interest Paid

West Missouri Power Company—Note.....	✓\$ 7,563.60
L. K. Green Trusts, Kansas City, Mo.....	8,850.00—?

Joint Exhibit No. 2—(Continued)

Lawrence R. Green—Deductions—Year 1939—(Continued)		
Interest Paid—(Continued)		
Interest on deficiency of Estate Taxes—Estate of L. K. Green....	X	4,143.01—?
Interest on deficiency of Gift Taxes.....		57.08
		<hr/>
Taxes Paid		
Real Estate and Personal Taxes		\$ 1,423.11
Automobile License		65.10
		<hr/>
California Income Tax		1,488.21
Oklahoma Income Tax		106.81
		8.91
		<hr/>
Other Deductions		
Legal and Accounting, including re estate tax, gift tax and other old tax matters		\$ 1,655.10 X
Financial Report Service—Babson		180.00
Rent of Safety Deposit Box.....		11.00
Discount on Canadian Funds		3.75
Shipping Securities		2.02
		<hr/>
Total Deductions		1,851.87
		<hr/>
		\$24,194.49
		<hr/>

20,613.69—?

1,603.93

1,851.87

\$24,194.49

Joint Exhibit No. 2—(Continued)

LAWRENCE R. GREEN

DETAILS OF GROSS INCOME

Dividends Received	
On Common Stocks:	
California Packing Corporation	\$ 15.00
Massachusetts Investors Trust	355.00
Manufacturers Trust Company	200.00✓
Montgomery Ward & Company	77.50
International Harvester Company	16.00
Aetna Insurance Company	160.00✓
Beech-Nut Packing Company	250.00
Air Reduction Company	159.70✓
American Telephone & Telegraph Co.	675.00✓
Chase National Bank	168.00✓
Great Atlantic & Pacific Tea Co.	375.00✓
Quarterly Income Shares	50.00
Southern California Edison Co.	210.00✓
E. I. Dupont de Nemours	112.50
Standard Oil of Indiana	37.50
F. W. Woolworth Company	300.00✓
El Paso Natural Gas Company	75.00
Standard Oil of California	85.00

Joint Exhibit No. 2—(Continued)

Lawrence R. Green—Details of Gross Income—(Continued)
Dividends Received—(Continued)

General Electric Company	270.00
United Gas & Improvement Company	26.25
Sperry Corporation	150.00✓
Missouri Public Service Corporation	30.00
*West Missouri Power Company	13,107.00✓
	<u>\$16,904.45</u>

On Preferred Stocks:

American Rolling Mills	\$ 12.50
Sharon Steel Corporation	100.00✓
Sunray Oil Corporation	137.49✓
San Diego Consolidated Gas & Electric Co.	63.00
Public Service of Oklahoma	72.00
Missouri Power & Light Co.	162.00✓
Escondido Finance Association	96.00
Sioux City Gas & Electric Company	140.00✓
Oklahoma Gas & Electric Company	131.25✓
Memphis Power & Light Company	137.51✓
	<u>1,051.75</u>
	<u><u>\$17,956.20</u></u>

* Marginal figures in pencil: 21 84½

[51]

Joint Exhibit No. 2—(Continued)

LAWRENCE R. GREEN

DETAILS OF GROSS INCOME—YEAR 1939

Interest Received—Bank Deposits, Notes, etc.

First National Trust & Savings Bank	\$	45.53
West Missouri Power Company		✓634.50
	\$	680.03

Interest Received—Corporation Bonds

Sundry:

Missouri Public Service Co.	\$	105.00
East Missouri Power Co.		2,500.00
New England Gas & Electric Co.		100.00
Associated Gas & Electric Co.		18.75
Quarterly Income Shares		2.50
Florida Power Corp.		250.00
Illinois Central R. R. Co.		200.00
Texas Electric Service Corp.		125.00
	\$	3,301.25

Tax Free Covenant—2%:

Virginia Public Service Co.	\$	275.00
Central Kansas Power Co.		60.00
Joplin Water Works Co.		250.00
Empire District Electric Co.		150.00

Joint Exhibit No. 2—(Continued)

Lawrence R. Green—Details of Gross Income—1939—(Continued)

Interest Received—Corporation Bonds—(Continued)

N. Y. Central & St. Louis R. R.....	110.00	
Southern Colorado Power Co.	210.00	1,055.00
		<hr/>
		\$ 4,356.25

Interest Received—Municipal and Government Bonds

Cherryvale, Kansas	California	Others
Vista Union High School	\$	\$ 95.00
City of San Diego, California	82.50	
Long Beach, Calif. School	240.00	
State of Arkansas "A" and "B"	360.00	
Esccondido Union High School		450.98
City of San Diego Standpipe	275.00	
City of San Diego Municipal Pier	25.00	
Yuma County, Arizona	125.00	
Cameron County, Texas		110.00
		369.15
	<hr/>	<hr/>
	\$ 1,117.50	\$ 1,025.13
		90.00
	<hr/>	<hr/>
Federal Land Bank Consols	\$ 1,117.50	\$ 1,115.13
		<hr/>
		\$ 2,232.63

Joint Exhibit No. 2—(Continued)

LAWRENCE R. GREEN

CAPITAL GAINS—YEAR 1939

\$3,000 Vista Union High School Bonds:				
Bought	7-16-35			\$ 3,000.00
Called	2-28-39			3,000.00
				<hr/>
Memphis Power & Light Co. Preferred Stock:				
Sold	7-31-39	30 Shares		\$ 3,000.00
Bought	9-17-36	10 "	\$ 905.00	
"	9-26-36	10 "	910.00	
"	12-6-37	10 "	665.00	
				<hr/>
Sold	7-31-39	10 "		\$1,000.00
Bought	4-23-38	10 "		505.35
				<hr/>
Total Capital Gain.....				\$1,014.65
				<hr/>
				\$ 754.65
				<hr/>

[Endorsed]: T.C.U.S. Filed Nov. 3, 1942. [53]

\$ 520.00 \$ 260.00

494.65 494.65

\$1,014.65 \$ 754.65

In the United States Circuit Court of Appeals
for the Ninth Circuit

(BTA) Docket No. 109145

JOSEPH D. NUNAN, JR., COMMISSIONER OF
INTERNAL REVENUE,

Petitioner on Review,

v.

LAWRENCE R. GREEN,

Respondent on Review.

PETITION FOR REVIEW AND ASSIGN-
MENTS OF ERROR

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Now Comes Joseph D. Nunan, Jr., Commissioner
of Internal Revenue, by his attorneys, Samuel O.
Clark, Jr., Assistant Attorney General, J. P. Wen-
chel, Chief Counsel, Bureau of Internal Revenue,
and Claude R. Marshall, Special Attorney, Bureau
of Internal Revenue, and respectfully shows:

I.

JURISDICTION

That the petitioner on review (hereinafter re-
ferred to as the Commissioner) is the duly ap-
pointed, qualified and acting Commissioner of In-
ternal Revenue, appointed and holding his office
by virtue of the laws of the United States; that the
respondent on review, Lawrence R. Green, (some-

times hereinafter referred to as the taxpayer) is an individual residing at San Diego, California, and filed his individual Federal income tax return for the taxable year 1939 with the Collector of Internal Revenue for the Sixth District of California, located at Los Angeles, California, which said collection district is within the jurisdiction of [54] the United States Circuit Court of Appeals for the Ninth Circuit, wherein this review is sought.

The Commissioner seeks a review of the decision of The Tax Court of the United States by the Circuit Court of Appeals for the Ninth Circuit by virtue of the provisions of Sections 1141 and 1142 of the United States Internal Revenue Code.

II.

PRIOR PROCEEDINGS

On August 16, 1941, the Commissioner, in accordance with the provisions of existing Internal Revenue laws, advised taxpayer that the determination of his income tax liability for the taxable year 1939 disclosed a deficiency in tax of \$728.18. Thereafter, on November 12, 1941, taxpayer filed a petition with the United States Board of Tax Appeals (now The Tax Court of the United States) for a redetermination of the proposed deficiency. The Commissioner filed his answer to the petition on December 31, 1941. On November 3, 1942, taxpayer filed an amended petition; and on December 11, 1942, the Commissioner filed his answer to the amended peti-

tion. The case was heard before the Tax Court on November 3, 1942, at Kansas City, Missouri; and on January 19, 1944, it promulgated its opinion; and on February 16, 1944, the Tax Court entered its decision, ordering and deciding that there is a deficiency in income tax of \$177.48 for the taxable year 1939.

III.

NATURE OF CONTROVERSY

Taxpayer's father, L. K. Green, died on July 5, 1930, leaving a will making the taxpayer and his brother the residuary beneficiaries of his [55] estate. They shared equally in their father's estate. The estate was duly administered by taxpayer as executor and the assets were distributed; and on October 13, 1931, the executor was discharged and given full and complete release. No assets were retained in the estate.

Thereafter, the Commissioner determined a deficiency in estate tax against the estate of L. K. Green. The matter was finally settled by the taxpayer and his brother paying, in 1939, as transferees of the assets, an estate tax deficiency of \$17,244.81, together with interest as provided by law in the amount of \$8,286.01, which interest was computed to July 8, 1939. Each transferee-beneficiary paid one-half of the deficiency and interest thereon, and each deducted in their respective income tax returns for the taxable year 1939, which were on the cash basis, the amount of \$4,143.00 designated as interest paid on the estate tax deficiency. The Com-

missioner disallowed the deductions in his determination of the deficiency herein.

The amounts received by the beneficiaries from the estate exceeded the amounts of the tax and interest paid.

The Tax Court held that the taxpayer is not entitled to deduct such portion of the interest which accrued upon the tax of the estate prior to distribution, because it clearly accrued upon an indebtedness of the estate and taxpayer received the distribution from the estate subject to a charge for interest accrued to the dates of transfer; but, it further held that the interest which accrued upon the estate tax deficiency after distribution by the estate accrued upon indebtedness of the taxpayer, and that he is entitled to deduct under the provisions of Section 23 (b) of the [56] Internal Revenue Code the amount of such interest paid by him on the estate tax deficiency in computing his net income for income tax purposes.

In reaching its decision, the Tax Court modified its long-standing opinion in *Helen B. Sulzberger*, (1936) 33 B.T.A. 1093. Four Judges of the Tax Court dissented.

The Commissioner presents that the property of the estate was received by taxpayer as transferee and came to him charged not only with a liability for the deficiency in tax, but for interest collectible "as a part of the tax" at the rate of 6% per annum from the due date of the tax (Sec. 891, Internal Revenue Code); that the amounts designated as

interest were not paid upon a personal indebtedness or an obligation of the taxpayer, and is accordingly not deductible under Section 23 (b) of the Internal Revenue Code in determining the amount of net income for income tax purposes.

IV.

ASSIGNMENTS OF ERROR

That the Commissioner of Internal Revenue, being aggrieved by the opinion and decision of The Tax Court of the United States in this proceeding, hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Ninth Circuit, and for the correction of the manifest errors which therein occurred and intervened to his prejudice. The errors committed by the Tax Court, which are relied upon by the Commissioner as the basis of this petition for review, are as follows: [57]

That The Tax Court of the United States erred:

1. In holding and deciding that the interest which accrued upon the estate tax deficiency after distribution of the assets of the estate accrued upon the indebtedness of taxpayer.

2. In failing to hold and decide that the amount designated interest which accrued upon the estate tax liability after distribution of the assets of the estate did not accrue on a personal liability or obligation of taxpayer.

3. In holding and deciding that taxpayer is entitled, under the provisions of Section 23 (b) of the

Internal Revenue Code, to deduct from his gross income the amount of interest paid by him on the estate tax deficiency which accrued thereon after distribution of the assets of the estate.

4. In failing to hold and decide that taxpayer is not entitled to deduct from his gross income the amount designated interest which accrued after the distribution of the assets of the estate and was paid in 1939 by him.

5. In that its opinion and decision are contrary to the law and the regulations, and are not supported by substantial evidence.

6. In ordering and deciding that there is a deficiency in income tax of only \$177.48 for the year 1939, due from taxpayer herein.

7. In failing to order and decide that there is a deficiency in income tax of \$648.27 for the year 1939, due from taxpayer herein. [58]

Wherefore, the Commissioner petitions that said findings of fact and opinion and decision of The Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of the said Court for filing, and that appropriate action be

taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

(Signed) SAMUEL O. CLARK, JR.,
SLY

Assistant Attorney General.

(Signed) J. P. WINCHEL,
SLY

Chief Counsel, Bureau of Internal Revenue,
Counsel for Petitioner on Review.

Of Counsel:

CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.

CRM/csl 3/1944.

[Endorsed]: Filed May 5, 1944. [59]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Lawrence R. Green,
2440 Pine Street,
San Diego, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 5th day of May, 1944, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for

the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 5th day of May, 1944.

Signed J. P. WENCHEL

SLY

Chief Counsel, Bureau of Internal Revenue,
Counsel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 11 day of May, 1944.

(Sgd) LAWRENCE R. GREEN,
Respondent on Review.

CRM/csl 4/1944.

[Endorsed]: Filed May 18, 1944. [60]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: W. E. Baird, C.P.A.,
701 Fidelity Building,
Kansas City, Missouri.

You are hereby notified that the Commissioner of Internal Revenue did, on the 5th day of May,

1944, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 5th day of May, 1944.

Signed J. P. WENCHEL,

SLY

Chief Counsel, Bureau of Internal Revenue,

Counsel for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 10 day of May, 1944.

(Sgd) W. E. BAIRD,

Counsel for Respondent on Review.

CRM/csl 4/1944.

[Endorsed]: Filed May 16, 1944. [61]

The Tax Court of the United States
Washington

Docket No. 109145

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

LAWRENCE R. GREEN,

Respondent.

CERTIFICATE OF CLERK

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 65, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 13th day of June, 1944.

[Seal]

B. D. GAMBLE,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 10810. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Lawrence R. Green, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed June 21, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10810

(BTA) Docket No. 109145

JOSEPH D. NUNAN, JR., Commissioner of Internal Revenue,

Petitioner on Review,

v.

LAWRENCE R. GREEN,

Respondent on Review.

STATEMENT OF POINTS ON WHICH PETITIONER ON REVIEW INTENDS TO RELY ON THE APPEAL

To Lawrence R. Green, 2440 Pine Street, San Diego, California, and W. E. Baird, 701 Fidelity Building, Kansas City, Missouri.

Please take notice that Joseph D. Nunan, Jr.,

Commissioner of Internal Revenue, petitioner on review in the above entitled action, intends to rely on the appeal on the following points:

That the Tax Court of the United States erred:

1. In holding and deciding that the interest which accrued upon the estate tax deficiencies after distribution of the assets of the estates accrued upon the indebtedness of taxpayer.

2. In failing to hold and decide that the amounts designated interest which accrued upon the estate tax deficiencies after distribution of the assets of the estates did not accrue on personal liabilities or obligations of taxpayer.

3. In holding and deciding that taxpayer is entitled, under the provisions of Section 23 (b) of the Internal Revenue Code, to deduct from his gross income the amounts of interest paid by him on the estate tax deficiencies which accrued thereon after distribution of the assets of the estates.

4. In failing to hold and decide that taxpayer is not entitled to deduct from his gross income the amounts designated interest which accrued after the distribution of the assets of the estates and were paid in 1939 by him.

5. In that its opinion and decision are contrary to the law and the regulations, and are not supported by substantial evidence.

6. In ordering and deciding that there is a deficiency in income tax of only \$333.38 for the year 1939, due from taxpayer herein.

7. In failing to order and decide that there is a

deficiency in income tax of \$1,201.94 for the year 1939, due from taxpayer herein.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

(Affidavit of Mailing attached.)

[Endorsed]: Filed July 8, 1944.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN RECORD ON REVIEW

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Please take notice that Joseph D. Nunan, Jr., Commissioner of Internal Revenue, petitioner on review, hereby designates the entire record in the above entitled proceeding which the petitioner on review thinks necessary for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit on review of the decision of the Tax Court of the United States in said proceeding entered February 16, 1944. Said record consists of the following documents and records:

1. Docket entries of the proceedings.
2. Pleadings:
 - (a) Petition, including annexed copy of deficiency notice with statement attached.
 - (b) Answer.
 - (c) Amended Petition.
 - (d) Answer to Amended Petition.

3. Opinion of Tax Court.
4. Decision of Tax Court entered February 16, 1944.
5. (a) Stipulation of Facts filed November 3, 1942.
(b) Joint Motion to Amend Stipulation of Facts.
6. Copy of Joint Exhibit No. 1.
7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
8. Any and all orders of enlargement of time for the preparation of the evidence and for the transmission and delivery of the record.
9. This Designation.

Transcript of said record had been prepared, certified and transmitted to the above entitled court by the Clerk of the Tax Court of the United States, as required by law and the rules of the above entitled court.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

[Endorsed]: Filed July 8, 1944.



No. 10810

**In the United States Circuit Court of
Appeals for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

LAWRENCE R. GREEN, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE PETITIONER

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
BERNARD CHERTCOFF,
Special Assistants to the Attorney General.

FILED

OCT 2 - 1944

PAUL P. O'BRIEN,
CLERK



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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10810

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

LAWRENCE R. GREEN, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinions in the Tax Court (R. 20-38) are reported in 3 T. C. 74.

JURISDICTION

This case involves the taxpayer's income tax liability for the calendar year 1939. The notice of deficiency is dated August 16, 1941 (R. 11), and the taxpayer's petition for redetermination was filed with the United States Board of Tax Appeals on November 12, 1941 (R. 1). The jurisdiction of the Board of Tax Appeals (whose name was changed by Section 504 of the Revenue Act of 1942 to the Tax Court of the United States) rested upon Section 871 of the Internal Revenue Code. The decision of the Tax Court

was entered on February 16, 1944 (R. 39), and the petition for review was filed on May 5, 1944 (R. 66-72). The jurisdiction of this Court rests upon Sections 1141-1142 of the Internal Revenue Code.

QUESTION PRESENTED

The taxpayer was a transferee of the estate of his deceased father and in 1939 paid a portion of a deficiency in estate tax asserted by the Commissioner against the estate, together with interest thereon. Is the taxpayer entitled to a deduction under Section 23 (b) of the Internal Revenue Code for the interest so paid?

STATUTE INVOLVED

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(b) *Interest*.—All interest paid or accrued within the taxable year on indebtedness,
* * *

* * * *

(26 U. S. C. 1940 ed., Sec. 23.)

SEC. 900. TRANSFERRED ASSETS.

(a) *Method of collection*.—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this subchapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and

proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees*.—The liability, at law or in equity, of a transferee of property of a decedent, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this subchapter.

* * * *

(e) *Definition of “transferee”*.—As used in this section, the term “transferee” includes heir, legatee, devisee, and distributee. (26 U. S. C. 1940 ed., Sec. 900.)

STATEMENT

The facts as stipulated by the parties and found by the Tax Court may be summarized as follows:

The taxpayer and his brother, Ralph J. Green, were the residuary beneficiaries, in equal shares, of the estate of their deceased father. The taxpayer was the executor of the estate, which was probated in Johnson County, Kansas. The final report of the executor was filed on September 4, 1931, showing that all specific bequests had been paid and asking for an order for final distribution to the residuary beneficiaries and discharge of the executor. The final distribution was accomplished and on October 13, 1931, the executor was discharged and given a full and complete release. No assets were retained in the estate. (R. 22, 40-41.)

After the final settlement of the estate the Commissioner asserted a deficiency in estate tax liability, and the matter was finally settled by the taxpayer and his

brother paying, in 1939, a deficiency in the amount of \$17,244.81, together with interest (computed to July 8, 1939) as provided by law in the amount of \$8,286.01. Each of them paid one-half of the total amount. (R. 23, 41.)

The amount received by the taxpayer from the estate of his father was greatly in excess of the amount of designated interest paid by him and there is no claim or any suggestion of claim that the amount received by him did not also exceed the total of the tax and interest which he paid. (R. 23-24, 42.)

In his income tax return for 1939 the taxpayer deducted \$4,143.01 as interest paid on the estate tax deficiency of his father's estate. The Commissioner disallowed the deduction. (R. 14.) The Tax Court held that the taxpayer was not entitled to deduct that portion of the interest referable to the period prior to the date of distribution of the estate, but that he was entitled to deduct that portion of the interest referable to the period subsequent to the distribution. (R. 20-34.) Four judges dissented, taking the view that the taxpayer was not entitled to any part of the claimed deduction.¹ (R. 34-38.)

STATEMENT OF POINTS TO BE URGED

The assignments of error, all of which are here relied upon, appear in the record at pages 70-71. They

¹ The Tax Court made the same ruling with respect to the similar deduction claimed by Ralph J. Green, brother of the taxpayer herein. That case is now pending on the Commissioner's appeal in the Eighth Circuit.

may be summarized by a statement that the Tax Court erred in holding that the taxpayer is entitled to the claimed deduction.

SUMMARY OF ARGUMENT

No part of the claimed deduction is allowable because the interest for which the deduction is claimed was not paid upon any indebtedness of the taxpayer. The taxpayer was under no personal liability for either the tax or interest thereon owing by ^{his} ~~its~~ transferor, but was merely in the position of having received property of a debtor which ^{he} ~~it~~ was not entitled to keep as against creditors; the liability was in no sense one to pay the tax or interest, but was simply one to disgorge. These principles had long been well settled prior to the introduction of the statutory provisions relating to transferees and it seems to be impliedly conceded that unless these statutory provisions have worked some change in the nature of a transferee's liability, no part of the deduction at issue is allowable. However, it has also been long and well settled that these statutory provisions have not made any change whatsoever in the nature of a transferee's liability, but have simply provided an administrative remedy for the enforcement of that liability if it otherwise exists. And there is nothing in the legislative history of the statutory provisions relating to transferees which would support in the slightest degree a departure now from the settled understanding of their meaning, nature and effect.

ARGUMENT

The taxpayer is not entitled to the claimed deduction

1. The taxpayer's claim for the deduction rests on Section 23 (b) of the Internal Revenue Code, *supra*, which allows a deduction for "interest paid or accrued within the taxable year of indebtedness". Since the claim is for a tax deduction, the section must be strictly construed against the taxpayer who must show that he comes plainly and squarely within the terms of the provision. *Helvering v. Northwest Steel Mills*, 311 U. S. 46; *John Wanamaker Philadelphia v. Commissioner*, 139 F. 2d 644, 646 (C. C. A. 3d), and cases there cited.

At the outset it should be observed that for a deduction to be allowable under Section 23 (b) the indebtedness upon which the amount has been paid "must be the taxpayer's indebtedness, not that of someone else". *Scripps v. Commissioner*, 96 F. 2d 492, 495 (C. C. A. 6th), certiorari denied, 305 U. S. 625. This principle is fundamental and has been applied in numerous situations. Thus one who pays interest on a mortgage on a home taken in his wife's name and on a loan made by his wife on an insurance policy is not entitled to a deduction therefor.² A corporation may not deduct interest paid by it on an obligation of its shareholders even though the money borrowed by the shareholders was for the use of the corporation.³ The deduction is not allowable even where the interest is paid pur-

² *Colston v. Burnet*, 59 F. 2d 867 (App. D. C.), certiorari denied, 287 U. S. 640.

³ *Morris Plan Co. of Binghamton v. Commissioner*, 26 B. T. A. 772; see also *Griffin v. Commissioner*, 7 B. T. A. 1094, and *Peoples Bank v. Commissioner*, 43 B. T. A. 589.

suant to a binding contract entered into for good consideration, unless the obligation to pay extends to the principal of the debt as well as to the interest.⁴ In such cases, no matter what they are called, the payments are not deductible interest under Section 23 (b) for they are not on the taxpayers' indebtedness.⁵

2. The majority opinion below does not dispute the rule that a deduction is not allowable under Section 23 (b) unless the interest is paid on the taxpayer's own indebtedness. (R. 28.) It takes the view, however, that so much of the interest as was referable to the period after the taxpayer acquired the assets of the transferor-estate *was* interest ⁱⁿ the taxpayer's own indebtedness. We think that this view rests upon a fundamental misconception of the nature of a transferee's liability. In essence it is to say that a transferee is a taxpayer within the meaning of the statute and when he pays a tax asserted against his transferor he is paying his own tax, and the interest thereon is in-

⁴ *Wood v. Rasquin*, 21 F. Supp. 211 (E. D. N. Y.), affirmed *per curiam*, 97 F. 2d 1023 (C. C. A. 2d); *Orange Securities Corp. v. Commissioner*, 45 B. T. A. 24, affirmed, 131 F. 2d 662 (C. C. A. 5th); *Simon v. Commissioner*, 36 B. T. A. 184. The deduction was disallowed in all of these cases to the payor of the interest because his obligation extended only to payment of the interest and not to payment of the principal of the debt.

⁵ We have been able to find only one situation in which a deduction for interest is allowable to one who is not personally liable on the principal debt; the case where an owner of property subject to a mortgage pays the interest on the mortgage. E. g., *New McDermott, Inc. v. Commissioner*, 44 B. T. A. 1035. But this is based on an express provision which has been in the regulations from the beginning. See Article 121 of Treasury Regulations 45, promulgated under the Revenue Act of 1918, and Section 29.23 (b)-1 of Treasury Regulations 111, promulgated under the Internal Revenue Code.

terest on his own indebtedness.⁶ The Tax Court predicates this position upon Section 900 of the Internal Revenue Code, *supra*, contending that this section imposes such a liability upon the transferee. And it seems to concede impliedly that without this section to rely upon no part of the deduction here claimed would be allowable. However, as the dissenting opinions by Turner, J. in the instant case and in *Koppers Co. v. Commissioner*, 3 T. C. 62, point out, the fallacy in such a position lies in the assumption that any liability is imposed by Section 900, for that section imposes no liability on anyone. It simply provides a remedy for the enforcement of a liability if that liability otherwise exists.

Long prior to the enactment of the transferee provisions, which first appeared as Sections 280 and 316 of the Revenue Act of 1926,⁷ the Government proceeded against transferees on the principle that when the assets of a debtor are transferred to one other than a bona fide purchaser for value without satisfying the

⁶ The views of the judges of the Tax Court on the question here presented are expressed in the opinions herein and in *Koppers Co. v. Commissioner*, 3 T. C. 62, pending in the Third Circuit. The Tax Court has followed its decisions in these cases in *Collins v. Commissioner*, decided March 13, 1944 (1944 P-H T. C. Memorandum Decisions Service, par. 44,079), pending in this Court; *Estate of Henderson v. Commissioner*, decided December 14, 1943 (1943 T. C. Memorandum Decisions Service, par. 43,505), pending in the Fifth Circuit; and *Breyer v. Commissioner*, decided January 20, 1944 (1944 P-H T. C. Memorandum Decisions Service, par. 44,015), pending in the Third Circuit.

⁷ Section 280 dealt with collection of income taxes and Section 316 with collection of estate and gift taxes from transferees. These are now Sections 311 (income tax), Section 900 (estate tax) and Section 1025 (gift tax) of the Internal Revenue Code.

claims of creditors, the creditors may collect their debts from the assets so transferred. This is the so-called "trust fund doctrine" which has sometimes been linked with the doctrine of fraudulent conveyances. See *McIver v. Hardware Co.*, 144 N. C. 478, 57 S. E. 169, and *Luedecke v. Des Moines Cabinet Co.*, 140 Ia. 223, 118 N. W. 456. The Government proceeded under this doctrine by a suit in equity. See *Phillips v. Commissioner*, 283 U. S. 589, 592, note 2. The Government may still proceed in that manner if it chooses. *Phillips-Jones Corp. v. Parmley*, 302 U. S. 233, 237. And a typical instance in which such a suit in equity would lie is that which is here involved: the collection from distributees of a decedent's estate of taxes owing by the estate. *Neustadter v. United States*, 90 F. 2d 34 (C. C. A. 9th).

Thus the fundamental nature of the transferee's liability is not in any proper sense a liability for the tax, but is simply a liability to disgorge, to return property in his possession which he is not entitled to keep as against creditors of the transferor. The transferee stands in a position similar to that of a trustee. Of course no creditor may receive more than his debt, and so the liability of the transferee to disgorge is limited to the amount to which the Government is entitled, namely, the tax and interest or other additions thereto owing by the transferor. And since the liability is not one to pay the tax, but merely to return property, the transferee's liability is also limited to a return of the property which he has received. The transferee's liability is thus limited in two ways:

(a) by the amount due the Government and (b) by the amount received by the transferee, whichever is less. 9 Mertens, Law of Federal Income Taxation, Sec. 53.39.

An additional problem is raised where the transferee receives an amount less than that due the Government, but has had the benefit of the use of that amount for some period of time. The rule applied by the Tax Court in such circumstances (following *United States v. Snook*, 24 F. 2d 844 (N. D. Ga.), reversed on another ground *sub nom. Austin v. United States*, 28 F. 2d 677 (C. C. A. 5th)), is to hold the transferee liable for the amount received, plus interest thereon from the date the assets were received at the prevailing legal rate under local law. *Buzard v. Commissioner*, 29 B. T. A. 981, 983-984, modified in 77 F. 2d 391 (App. D. C.). However, the fact that there is a duty to pay what may be denominated as "retention interest" in no way affects the *nature* of the transferee's liability, which, as we have pointed out, is simply one to disgorge. The obligation to pay retention interest is significant only with respect to the measure of the liability, not to its nature. Retention interest is the price paid by the transferee for retaining and using funds to which he was not entitled. It is not the same as the interest due on the transferor's tax. In any event no retention interest is involved in this case for there is no suggestion here that the taxpayer received from his transferor less than the tax and interest which he subsequently paid to the Collector. Therefore, even if it should be assumed that

retention interest would be a proper deduction under Section 23 (b),⁸ that would have no bearing upon the instant case.

Unless the transferee provisions of the Revenue Acts have worked some change in the nature of a transferee's liability, it would seem to be beyond question that the interest for which the taxpayer here claims a deduction was not interest paid on his own indebtedness; the taxpayer simply returned property which he was not entitled to keep and the measure of what he was required to return was the amount owing by his transferor. And it has long been well settled that these provisions of the statute in no way affect the nature or extent of the pre-existing liability of transferees and do not impose any new liability. See *Phillips v. Commissioner, supra*; *Phillips-Jones Corp. v. Parmley, supra*; and the cases cited in note 3 of Judge Turner's opinion in the *Koppers* case.

Experience had shown that a suit in equity or an action at law to enforce payment by a transferee was a cumbersome remedy and was not very efficacious. There was need for an administrative method by which the Commissioner could proceed in transferee cases. And the only purpose of Sections 280 and 316 of the Revenue Act of 1926 and corresponding sections of the subsequent Acts is simply to provide such an administrative remedy. In order for the Commissioner to proceed under these provisions it is necessary

⁸ This view is taken in Judge Turner's dissenting opinion in the *Koppers* case.

that the liability exist independently of them. *Phillips v. Commissioner, supra*, pp. 592, 593.⁹

It is true that this administrative method for enforcing a transferee's liability is similar, though by no means identical,¹⁰ to that available for enforcing a taxpayer's liability. Thus in the procedural sense the transferee might be described as a taxpayer. But it is obviously specious to argue from this that the transferee is therefore substantively a taxpayer when he is called upon to disgorge in order to satisfy his transferor's tax liability.

⁹ See S. Rep. No. 52, 69th Cong., 1st Sess., p. 30 (1939-1 Cum. Bull. (Part 2) 332, 354) :

"Under existing law proceedings for the enforcement of liabilities such as those heretofore discussed are solely by court proceedings. No proceeding before the Board for the redetermination of a deficiency and for the ultimate enforcement by assessment and distraint may be had.

"It is the purpose of the committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the Act for the enforcement of tax deficiencies. It is not proposed, however, to define or change existing liability. The section merely provides that if the liability of the transferee exists under other law then that liability is to be enforced according to the new procedure applicable to tax deficiencies."

See also the report of the Conference Committee on the Revenue Act of 1926, referred to later herein.

¹⁰ The Commissioner has the burden of proving the liability of the transferee, although not that of the taxpayer-transferor. He must show that the transfer was without adequate consideration and that he has exhausted his remedies, or that no adequate remedy exists, against the transferor. He frequently fails to sustain the burden. E. g., *Weil v. Commissioner*, 91 F. 2d 944 (C. C. A. 2d) ; *Burke v. Commissioner*, 21 B. T. A. 45 ; *Limroth v. Commissioner*, 22 B. T. A. 595 ; *Davis v. Commissioner*, 24 B. T. A. 36 ; *Goldman v. Commissioner*, 24 B. T. A. 915 ; *Roth v. Commissioner*, 26 B. T. A. 631 ; *American Feature Film Co. v. Commissioner*, 24 B. T. A. 18 ; *Harjo v. Commissioner*, 34 B. T. A. 467.

3. The question here involved has recently been before the Tenth Circuit and in a well reasoned opinion that court sustained the Government's position. *Koch v. United States*, 138 F. 2d 850. We submit that that decision is correct and should be followed.

Prior to its decision in the instant case the Tax Court had itself, following the principles upon which we rely, held that a transferee is not entitled to any part of such a deduction as is here claimed. In *Sulzberger v. Commissioner*, 33 B. T. A. 1093, the deduction was disallowed to beneficiaries of an estate who as transferees had paid deficiencies in estate taxes. In *Brown v. Commissioner*, 1 T. C. 225, the deductions were disallowed to legatees who paid a deficiency in gift tax due from their decedent. See also I. T. 3156, 1938-1 Cum. Bull. 213, and *Automatic Sprinkler Co. of America v. Commissioner*, 27 B. T. A. 160.

Scripps v. Commissioner, 96 F. 2d 492 (C. C. A. 6th), certiorari denied, 305 U. S. 625, which the Tax Court cites (R. 28), is plainly distinguishable. In that case a trust which had been created by the decedent during his lifetime, and which was includible in his gross estate for estate tax purposes, was allowed a deduction for interest paid on the estate tax, but this result was rested expressly on Section 315 of the Revenue Act of 1926, which provided that in such circumstances "the trustee shall be personally liable for such tax", and imposed a lien on the property. The correctness of *Toy v. Commissioner*, 34 B. T. A. 877, upon which the majority below also

rely, is open to doubt.¹¹ But its soundness need not be examined for it is also distinguishable. In that case the Government had proceeded successfully against the administrators of an estate, both in their representative capacities and in their individual capacities to collect an estate tax deficiency. The Board allowed the deduction for some (though not all) of the interest paid, but rested its decision expressly on the narrow ground that under Section 3467 of the Revised Statutes the administrators were personally liable for the tax, pointing out (p. 883) that if their liability to the Government had rested only upon their status as transferees, the deduction would not be allowable. None of the other cases, cited by the majority below in the instant case or in the *Koppers* case, enunciates any principles at variance with those upon which we rely. Indeed, in so far as these cases are in point at all, they support our position.¹²

¹¹ See the dissenting opinion herein. (R. 36.)

¹² *Robinette v. Commissioner*, 139 F. 2d 285 (C. C. A. 6th), certiorari denied May 22, 1944; *Commissioner v. Bebee*, 67 F. 2d 662 (C. C. A. 1st); *O'Brien v. Commissioner*, 47 B. T. A. 561; *Estate of Morrell v. Commissioner*, 43 B. T. A. 651; *Continental Baking Co. v. Commissioner*, 27 B. T. A. 884, affirmed, 75 F. 2d 243 (App. D. C.), certiorari denied, 295 U. S. 756; *C. P. Ford & Co. v. Commissioner*, 28 B. T. A. 156; *Watson v. Commissioner*, 25 B. T. A. 971; *Wayne Body Corp. v. Commissioner*, 24 B. T. A. 524; *Fos-toria Milling & Grain Co. v. Commissioner*, 11 B. T. A. 1401; *Garcin v. Commissioner*, 22 B. T. A. 1027.

Penrose v. United States, 18 F. Supp. 413 (E. D. Pa.), was not dealt with as a transferee case, and simply held that payments made by a testamentary trust should be treated as though they had been made by the decedent's estate. On the point upon which it was decided, the *Penrose* case is contrary to *Jones v. Hassett*, 45 F. Supp. 195 (Mass.).

In the instant case the Tax Court overruled its prior decisions in the *Sulzberger* and *Brown* cases, and in the *Koppers* case it expressly refused to follow the decision of the Tenth Circuit in *Koch v. United States, supra*, on the ground that the court had not considered the legislative history of the transferee provisions. We, of course, do not suggest that the Court should not seek every aid in the interpretation of the statute. Cf. *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479. But we do wish to call to the Court's attention that the Tax Court has in no manner connected the intention which it has distilled from the committee reports with any part of the statute. It has given no indication as to which words in Section 316 of the 1926 Act can be construed to impose any liability upon the transferee for any part of such interest as is here involved.

A remedy is provided by Section 316 for enforcement of the liability "of a transferee of property of a decedent" for the tax "imposed by this title". The only tax "imposed by this title" is the estate tax which is levied upon the decedent's estate and attaches to the estate before distribution; no tax is levied upon the transferee.¹³ And that tax, which is "imposed upon" the estate is expressly defined to include "interest, additional amounts and additions to the tax provided by law". We can perceive no ambiguity in the language of the statute or any way in which its language can be construed to impose any personal liability for tax or interest upon the transferee.

¹³ *New York Trust Co. v. Eisner*, 256 U. S. 345; *Riggs v. Del Drago*, 317 U. S. 95; cf. *Knowlton v. Moore*, 178 U. S. 41.

In any event analysis of the legislative history shows that there is nothing therein which even remotely supports the Tax Court's conclusion. As the Bill which became the Revenue Act of 1926 passed the House it contained no provisions relating to transferees; these provisions were first introduced into the Bill by the Senate Finance Committee. And since the Finance Committee recommended, and the Senate voted for, repeal of the estate tax,¹⁴ the legislative history relating to the transferee provisions in the Senate deals only with Section 280 which provided for collection of income taxes from transferees. When the Bill went to conference the estate tax was restored and Section 316, relating to collection of estate taxes from transferees, was added as a cognate provision to Section 280. The report of the Conference Committee does not contain any detailed discussion of Section 316; it merely states that in general the explanation which it makes of Section 280 is also applicable to Section 316.¹⁵ Thus in so far as Section 316 alone is concerned there is no legislative history pertaining directly to that section which intimates in the slightest degree that Congress intended to im-

¹⁴ S. Rep. No. 52, 69th Cong., 1st Sess., pp. 7-8 (1939-1 Cum. Bull. (Part 2) 332, 338-339).

¹⁵ H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 50 (1939-1 Cum. Bull. (Part 2) 361, 376) :

"Sections 316 and 317 of the estate tax title relate to the enforcement of the liability of transferees or fiduciaries in respect of an unpaid estate or gift tax and to the giving of notice to the Commissioner by fiduciaries of the assumption of their fiduciary capacity. In general the discussion under amendments Nos. 87 and 88 is applicable in explaining the effect of sections 316 and 317. Therefore a complete discussion is here omitted."

pose upon the transferee any personal liability for the estate tax or interest thereon. Nor does the history of Section 280 furnish any indication that Congress intended by that section to impose such a liability upon transferees with respect to income taxes.

As originally proposed by the Finance Committee, and then passed by the Senate, Section 280 contained a clause in subsection (c) providing that the transferee should not be liable for any "interest, additional amounts, or additions to the tax (other than those to which the taxpayer was liable and other than the interest specified hereinafter in subdivision (e) of this section)". Subdivision (e) provided that if, following a final Board decision and assessment of the tax, payment was not made within ten days after notice and demand by the Collector, interest should be imposed at the rate of one percent a month from the date of notice and demand until payment.

In explanation of this provision the Finance Committee said (S. Rep. No. 52, 69th Cong., 1st Sess., p. 30 (1939-1 Cum. Bull. (Part 2) 332, 354-355)):

The liability which arises in the transferee in respect of the receipt of the assets is normally to be measured by the liability of the transferor at the time of the transfer. This would include the amount of the tax due plus all interest, additional amounts, and additions to the tax provided by law, up to the time of such transfer. The section, however, provides that the liability of the transferee in this amount shall not in turn be subject to interest, additional amounts, or additions to tax, save that in case the transferee petitions the Board

for a redetermination of his liability, the amount so determined shall draw interest at the rate of 1 per cent a month commencing with notice and demand for payment following the final decision of the board.

The Senate may have had one of two possible meanings in mind. If in subsection (c) of Section 280 the words "to which the taxpayer was liable" (referring to interest which could be collected from the transferee) are construed, by emphasizing the word "was," as imposing a time limitation on the running of interest, then the Senate intended that interest on the tax owned by the transferor should stop running at the date of the transfer. If this is what the Senate meant the intention was changed when the Bill went to conference and was not carried out in the final enactment of the Bill.

The second possible meaning which the Senate may have had in mind was to make clear that the transferee's liability was only to pay what the transferor owned, including interest to the time of payment; no additional interest¹⁶ was to be imposed upon the amount which the transferee should ultimately be required to pay over, that is, in the words of the Finance Committee, the "liability of the transferee shall not in turn be subject to interest." If this is what the Senate

¹⁶ Except for the "non-payment interest" imposed at the rate of one percent per month for failure to pay within ten days after notice and demand by the Collector. This "non-payment interest" is the same interest which would be imposed upon the transferor for failure to pay after notice and demand. And as finally enacted Section 280 made it clear that even this "non-payment interest" is collected not as a personal liability of the transferee, but as part of the tax owing by the transferor.

meant, then the intention persisted through the final enactment of the Bill.

The dissenting opinion by Judge Turner in the *Koppers* case takes the view that the Senate had the first meaning in mind. We are inclined to the view that the Senate had the second meaning in mind and that the changes made by the Conference Committee were modifications in language only. It is unnecessary to resolve the point, however, for under either view it is plain that the Senate had no intention of imposing upon the transferee any personal liability for interest whatsoever.¹⁷

In the Conference Committee the Senate version of Section 280 was rewritten to the form in which it was finally enacted. The committee stated that its version "modifies the Senate amendment in the matter of interest and the statute of limitations for assessment of transferees." H. Conference Rep. No. 356, 69th Cong., 1st Sess., pp. 42-43 (1939-1 Cum. Bull. (Part 2) 361, 371). If Judge Turner's view as to the Senate's intent is correct then a substantive modification was made by the Conference Committee, namely, there was eliminated the provision that interest on the tax owned by the transferor should stop running at the date of the transfer. If our view as to the Senate's intent is correct, then the modifications made by the Conference Committee were in language only. But whether the changes made by the Conference Committee were substantive or only literary, as changed and as enacted, the

¹⁷ With the possible exception of "non-payment interest" and as we pointed out in note 16, *supra*, even this interest was not made a personal liability of the transferee. In any event, no "non-payment interest" is involved in this case.

intent was clear that no new personal liability was being imposed upon the transferee and that the interest collectible from the transferee was only that which the transferor owed. The report describes the effect of the section in the following language (p. 43):

Without in any way changing the extent of such liability of the transferee under existing law, the amendment enforces such liability "whether in respect of the tax as originally returned by the taxpayer or a deficiency therein" in the same manner as liability for a tax deficiency is enforced; that is, notice by the Commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the courts.

And it goes on to say with respect to interest (p. 44):

Under the amendment the liability of the taxpayer for the tax, including all interest and penalties, is fixed as of the time of the transfer of the assets. No further interest subsequently accrues upon such liability as assumed by the transferee, except the interest under section 276 (b) and (c) for failure to pay upon notice and demand after the outlined procedure has been completed and interest at 6 percent a year for reimbursing the Government at the usual rate for loss of the use of the money due it.

The reference in the above quotation to "interest at 6 percent a year * * * the usual rate" was, we think, to the interest imposed upon the transferor as the taxpayer under Section 274 (j) of the Revenue

Act of 1926,¹⁸ for that is the only section providing for such interest on deficiencies, and, it may be observed that that interest runs from the date when the tax was due from the transferor and is "collected as a part of the tax." In the *Koppers* case Judge Turner took the view that this reference was to what we have referred to herein as "retention interest". But it is again unnecessary for the Court to resolve the point for no retention interest is involved in this case and under either interpretation of this reference in the report of the Conference Committee there is not the slightest iota of support for the Tax Court's view that any personal liability for either the tax or any of the ordinary interest thereon was intended by Congress to be imposed upon transferees.

As we pointed out earlier herein, it has long been well and definitely settled that no liability of any nature is imposed on anyone by Section 280 or Section 316 of the Revenue Act of 1926, or their counterparts in later Revenue Acts. We have nevertheless discussed the legislative history of these sections at some length because the majority opinion below places primary reliance upon that history. As we have shown there is nothing in that history to support a departure now from the long settled understanding of the meaning, nature and effect of the transferee provisions.

¹⁸ This is now Section 292 of the Internal Revenue Code. The cognate provision under the estate tax is Section 308 (h) of the Revenue Act of 1926 (now Section 891 of the Internal Revenue Code) which imposes interest at six percent on deficiencies from the date the tax was due and likewise provides that such interest shall be "collected as a part of the tax."

It follows both on principle and on authority that the taxpayer is not entitled to the deductions allowed by the Tax Court.

CONCLUSION

The decision of the Tax Court is erroneous and should be reversed.

Respectfully submitted,

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SEPTEMBER 1944.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

LAWRENCE R. GREEN, RESPONDENT

**On petition for review of the decision of The Tax
Court of the United States**

Brief for the Respondent

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FILED

NOV 18 1944

PAUL P. O'BRIEN,
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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 10,810

COMMISSIONER OF INTERNAL REVENUE, PETITIONER
vs.

LAWRENCE R. GREEN, RESPONDENT

**On petition for review of the decision of The Tax
Court of the United States**

Brief for the Respondent

OPINIONS BELOW

Before The Tax Court of the United States, the case of Ralph J. Green, brother of taxpayer, which case involved the same issues, was consolidated with the case of Lawrence R. Green for opinion, and the opinions of The Tax Court (R. 20-34) are reported in 3 T. C. 74. The Commissioner appealed to the Eighth Circuit regarding the case of Ralph J. Green, and that appeal is pending.

JURISDICTION

This case involves the taxpayer's income tax liability for the calendar year 1939. The decision of the Tax Court was entered on February 16, 1944 (R. 39), and the petition for review was filed on May 5, 1944 (R. 66-72). The juris-

diction of the Court rests upon Sections 1141-1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

The taxpayer was transferee of the estate of his deceased father. In 1939 he received considerable gross income from assets previously received by distribution from this estate, and also paid a deficiency in estate tax, with interest thereon, assessed by the Commissioner with respect to the estate.

(a) Is the taxpayer entitled to a deduction under Sec. 23 (b) of the Internal Revenue Code for the interest so paid?

(b) Or, in the alternative, if it should be held that in paying the estate tax and interest the taxpayer was paying indebtedness of the estate or trust, and was not paying interest on his indebtedness, should the gross income of taxpayer for 1939, derived from assets previously distributed from the estate, be reduced by the interest paid for the estate or trust, resulting from distribution of the estate?

STATUTES INVOLVED

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(b) *Interest*.—All interest paid or accrued within the taxable year on indebtedness, * * *

* * * * *

SEC. 162. NET INCOME.

The net income of the estate or trust shall be

computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estates, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary; * * *

Internal Revenue Act of 1926:

SEC. 316 (Now Code SEC. 900)

SEC. 316 (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a decedent or a donor, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this title or by any prior estate tax Act or by any gift tax Act.

(e) As used in this section the term "transferee" includes heir, legatee, devisee, and distributee.

Sec. 315 (Now Code Sec. 827)

Sec. 315 (a) Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.***

NOTE. The decedent died in 1930. The Revenue Act of 1926, as amended, controlled the affairs of the estate. The pertinent sections of the Revenue Act of 1926 were enacted with practically no change in the Internal Revenue Code.

Revised Statutes:

Sec. 3467 (Comp. Sts. 1916, Sec. 6373) Every executor, administrator, or assignee, or other person, who pays any debts due by the person or estate from (for) whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

STATEMENT OF FACTS

The statement of facts contained in the brief of the Commissioner is correct.

SUMMARY OF ARGUMENT

I. The taxpayer paid interest on his own indebtedness and is entitled to the claimed deduction under Section 23 (b) of the Internal Revenue Code.

(a) The interest paid with respect to an estate tax deficiency is *interest* and not a part of the principal of the tax.

I. T. 1317, C. B., I-1, p. 132 *Boies Penrose vs. United States*, 18 Fed. Supp. 413.

(b) An estate tax deficiency is indebtedness under Section 23 (b), I. R. C.

W. S. Gilman vs. Commissioner, 18 B.T.A. 1277.

Fall River Electric Light Co. vs. Commissioner, 23 B.T.A. 168

Sterling Morton vs. Commissioner, 38 B.T.A. 1270

William Park vs. Commissioner, 38 B.T.A. 1118

Treasury Decision 4777, Cum. Bull. 1937-2 p. 196.

(c) A transferee of an estate is a substituted taxpayer, or at least a substituted debtor, and an unpaid estate tax becomes the liability and indebtedness of the transferee, especially after the estate has been distributed and has no assets to pay the tax.

Phillips vs. Commissioner, 283 U.S. 589.

Louisiana and Arkansas Railway Co. vs. Commissioner, 70 Fed. (2d) 286.

Routzahn vs. Tyroler, 36 Fed. (2d) 208 (C.C.A. 6).

United States vs. Updike, 281 U.S. 489, 496.

John H. Hord vs. Commissioner, 95 Fed. (2d) 179.

Estate of John Edgerly Morrell vs. Commissioner, 43 B.T.A. 651.

Boies Penrose vs. United States, 18 Fed. Supp. 413.

Robert P. Scripps, et al, Trustee, vs. Commissioner, 96 Fed. (2d) 492.

Harvey M. Toy vs. Commissioner, 34 B.T.A. 877.

Koppers Company vs. Commissioner, 3 T.C. 62, on appeal C.C.A. 3.

Breyer vs. Commissioner, T.C. Memorandum Opinion, January 20, 1944, on appeal C.C.A. 3.

Estate of Henderson vs. Commissioner, T.C. Memorandum Opinion, December 14, 1943, on appeal C.C.A. 5.

Collins vs. Commissioner, T.C. Memorandum Opinion March 13, 1944, on appeal C.C.A. 9.

Harold F. Pitcairn, et al vs. Commissioner, T. C. Memorandum opinion, May 22, 1944.

(d) If the operation of law did not make the taxpayer herein a substituted taxpayer regarding estate taxes, but only made him a substituted debtor, he should still be allowed to deduct the full amount of interest paid.

Columbia River Paper Mills vs. Commissioner, 43 B.T.A. 104, Affd. 126 Fed. (2d) 1009 (C.C.A. 9).

Oregon Pulp & Paper Co. vs. Commissioner, 47 B.T.A. 772, Petition for Review dismissed November 2, 1943.

Ernst Kern Co. vs. Commissioner, 1 T.C. 249, Petition for Review dismissed (nolle prosequere) September 11, 1944.

Pressed Steel Car Co., Inc., vs. Commissioner, T.C. Memorandum Opinion, August 16, 1944.

(e) The liability of a transferee may be more than the value of transferred assets plus actual accumulated earnings thereon.

Henry Capellini vs. Commissioner, 16 B.T.A. 802.

Wayne Body Corporation vs. Commissioner, 24 B.T.A. 524.

Buzard et al vs. Helvering, 77 Fed. (2d) 391.

(f) "Indebtedness" under Section 23 (b) of the Internal Revenue Code is not necessarily restricted to liabilities originated by the taxpayer, or with respect to which collection may be enforced from any property owned by him.

Scripps et al vs. Commissioner, 96 Fed. (2d) 492.

Penrose vs. United States, 18 Fed. Supp. 413.

New McDermott, Inc., vs. Commissioner, 44 B.T.A. 1035.

Agnes I. Fox vs. Commissioner, 43 B.T.A. 895.

House Com. Rep. No. 2333, 77th Cong., 1st Sess., Cum. Bull. 1942-2, 372, 495.

(g) Taxpayer was Executor of his father's estate and as such he was personally liable under Section 3467 R.S. in addition to being liable as a transferee.

Rev. Stats. Sec. 3467.

(h) Taxpayer was reporting on a cash basis and should deduct full accrual of interest when paid.

Street & Smith Publication, Inc. vs. U. S., 38 Fed. Supp. 461.

G. C. M. 9575 X-1 C.B. 381.

I. T. 3491 1941-2 C.B. 177.

I. T. 2210 IV-2 C.B. 43.

(i) Interest received by a transferee with respect to a refund of estate taxes would be taxable income of transferee, and not receipt of non-taxable principal of estate; the same rules should govern the payment of interest on a deficiency.

II. On the trust fund theory, the gross income of taxpayer should be reduced by the amount of interest paid with respect to the estate, or any trust arising from the distribution of the estate.

(a) If, under the so-called "trust fund doctrine" a transferee taxpayer, when paying an estate tax deficiency and interest, is only paying the liability of the estate instead of his indebtedness and interest, and therefore he can not deduct the interest himself, then taxpayer's gross income for 1939, derived from the trust of properties transferred from the estate, should be reduced by the interest paid for the estate in 1939.

Koch vs. U. S., 138 Fed. (2d) 850.

THE TAXPAYER PAID INTEREST ON HIS OWN INDEBTEDNESS

(a) The interest paid with respect to an estate tax deficiency is interest and not a part of the principal of the tax.

Since 1922, at which time I.T. 1317, C.B. I-1, p. 132 revoked O.D. 594 (C.B. 3, p. 142), it has been the law that interest paid on an overdue Federal Income Tax constituted an allowable deduction on income tax of the estate and that the interest was interest and was not a part of the principal of the tax.

This is true although the interest so paid by the estate is collected under Section 891 of the Internal Revenue Code as a part of the tax. A transferee is merely a substituted taxpayer by reason of Section 316, Revenue Act of 1926. He pays an estate tax deficiency with interest added as a part of the tax. There is no more reason to say that the interest added to tax and paid by a transferee is a part of the tax, and therefore is not interest, than there is to make the same claim with respect to similar interest paid by an estate.

Section 308 (h), Revenue Act of 1926 (now Code Sec. 891) provides that the interest on a deficiency is being assessed at the same time as the deficiency "and shall be collected as a part of the tax." The law further provides a somewhat elaborate procedure for collection of the tax including jeopardy assessments and filing of liens against property. Any interest on a deficiency is to be collected as interest. If the foregoing quoted portion of the law changed

interest into a tax, then the estate could not deduct any such amount as interest. The law would apply equally as well to the estate as to the transferee. There is no more reason to say that interest is added to the tax paid by the transferee and therefore is a part of the tax than there would be to make a similar claim with respect to interest on an estate tax deficiency paid by an estate before its distribution.

In *Penrose vs. U. S.*, 18 Fed. Supp. 413, the Court decided that interest added to the tax was interest paid on indebtedness and not a part of the estate tax.

(b) An estate tax deficiency is indebtedness under Section 23 (b).

The word *indebtedness* as used in Section 23 (b) is not defined in the statute. However, the Board of Tax Appeals and the courts have defined indebtedness in this connection as something owed in money which one is unconditionally obligated or bound to pay, the payment of which is enforceable. *Park vs. Commissioner*, 38 B. T. A. 1118, *Gilman vs. Commissioner*, 18 B. T. A. 1277: which was followed in *Morton vs. Commissioner*, 38 B. T. A. 1270. In *Fall River Electric Light Company vs. Commissioner*, 23 B. T. A., 168, interest is defined as "the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention, of money." In T. D. 4777, C. B. 1937-2, p. 196 the Commissioner defined indebtedness with respect to personal holding companies: "The term 'indebtedness' means an obligation, absolute and not contingent, to pay, on demand or within a given time, in cash or other medium, a fixed amount."

It is clear, especially in recent years, that an estate tax is indebtedness so that interest thereon qualifies as a deduction for the estate under 23 (b). It is also true that the tax liability imposed upon a transferee is an indebtedness. By law the transferee owes the Government money. The law makes it his obligation to make payment. It draws interest at a rate fixed by law. It has a due date. If transferee does not pay, the Government has the same means of enforcing payment which it has to enforce payment against an estate.

When an estate tax deficiency is proposed against a transferee, the transferee has the choice of paying the tax or contesting it. If he elects to retain the funds and not pay the tax until at some later time after contest and adjudication of the amount, he must pay interest on the amount that is finally determined—that is, he pays interest for the privilege of retaining an amount which constituted his indebtedness to the Government.

(c) A transferee of an estate is a substituted taxpayer, or a substituted debtor, and an unpaid estate tax becomes the liability and indebtedness of the transferee, especially after the estate has been distributed and has no assets to pay the tax.

Sec. 301, Revenue Act of 1926 (now Code Sec. 810) imposed a tax upon the transfer of the estate of a decedent but did not specify against whom the tax was imposed. Sec. 304, Revenue Act of 1926 (now Code Sec. 821) required returns by executor or beneficiaries. Sec. 305 (a), Revenue Act of 1926 (now Code Sec. 822 (b)) stated that the tax must be paid by the executor to the collector. Sec. 315 of

the Revenue Act of 1926 (now Code Sec. 827 (a)) provided that unless the tax was paid in full it should be a lien for ten years on the gross estate of decedent. Prior to 1926 the government proceeded against transferees under the trust fund doctrine, but this method of using a suit in equity or an action at law to enforce payment by a transferee was cumbersome and Sec. 316 of the Revenue Act of 1926 (now Code Sec. 900) was enacted to provide that the liability of a transferee of property of a decedent or donor should be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as a deficiency in the tax. This simplified the procedure of collection in that transferee was placed in the same status as the original taxpayer. It is therefore contended that the transferee becomes a substituted taxpayer with all the rights and privileges of the original estate taxpayer.

In *Phillips vs. Commissioner*, 283 U. S. 589, affirming 42 Fed. (2d) 177, the United States Supreme Court gives a very good discussion of liability of a transferee. The court said:

“Stockholders who have received the assets of a dissolved corporation may confessedly be compelled, in an appropriate proceeding, to discharge unpaid corporate taxes***. Before the enactment of Section 280 (a) (1), such payment by the stockholders could be enforced only by a bill in equity or action at law. Section 280 (a) (1) provides that the liability of the transferee for such taxes may be enforced in the same manner as that of any delinquent taxpayer.”

“The procedure prescribed for collection of the tax from the stockholders is thus the same as that now followed when payment is sought directly from the corporate taxpayer**.”

"Section 280 (a) (1) provides the United States with a new remedy for enforcing the existing 'liability at law or in equity.' The quoted words are employed in the statutes to describe the kind of liability to which the new remedy is to be applied and to define the extent of such liability. The obligation to be enforced is the liability for the tax.***"

See also *Louisiana and Arkansas Railway Company vs. Commissioner*, 70 Fed. (2d) 286.

In *Routzahn vs. Tyroler*, 36 Fed. (2d) 208, (C. C. A. 6), the Court held that the statutory definition of "taxpayer" is not seriously inaccurate as applied to a transferee, and in *United States vs. Updike*, 281 U. S. 489, 496, the Court says:

"* * * Indeed, when used to connote payment of a tax, it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax."

The transferee becomes a substituted taxpayer. He can contest the tax, appeal to The United States Board of Tax Appeals (now Tax Court) and litigate the matter through higher courts, or he can pay the tax and prosecute a claim for refund. If he does not pay the tax when finally determined, the Commissioner can assess and collect from him the amount of such liability, at law or in equity, under the same procedure as would be used against the estate. (Sec. 316, Revenue Act of 1926, now Code Sec. 900.)

If an estate tax deficiency is assessed against an estate and paid before it is distributed, such estate tax is an in-

debtedness of the estate and the interest paid thereon is deductible by the estate. If the assets are distributed without collection of the proposed deficiency and the deficiency is then asserted against the transferee, then such transferee is liable for the possibility of such tax. If after considerable negotiations and possible litigation the amount of tax is determined, then the transferee is definitely liable; certainly he would have to show such liability as an indebtedness in any correct statement of financial condition. No banker would accept a financial statement in which the legal liability for the determined amount of an estate tax deficiency was omitted or would recognize the government's contention that the estate tax deficiency was not an indebtedness of such transferee.

Estate taxes are a lien against the property of the estate and the liability for that lien follows the property into the hands of the transferee beneficiary. The interest paid by him on such obligation would be deductible the same as interest on a mortgage or mechanic's lien.

Taxpayer and his brother were the two and only residuary beneficiaries. They shared equally in the distribution of the estate; they shared equally in paying the tax and interest thereon. There was no other person to whom they could look to recoup the payment. The tax was their liability. The taxpayer had the tax imposed upon him as transferee, and under the law, his property which he received from the estate was liable for the tax and interest. The taxpayer took the place of the estate as a taxpayer. If he preferred to delay payment of tax in connection with protesting same, he had the right to do so, but any such delay made a longer

period to compute interest on his liability. The interest on the tax as finally determined was interest paid on his indebtedness, and should be allowed as a deduction in determining his net income.

John H. Hord vs. Commissioner, 95 Fed. (2d) 179;.

Estate of John Edgerly Morrell vs. Commissioner, 43 B.T.A. 651.

Boies Penrose vs. United States, 18 Fed. Supp. 413.

Robert P. Scripps, et al, Trustee, vs. Commissioner, 96 Fed. (2d) 492.

Harvey M. Toy vs. Commissioner, 34 B.T.A. 877.

Koppers Company vs. Commissioner, 3 T.C. 62, on appeal C.C.A. 3.

Estate of Henderson vs. Commissioner, T.C. Memorandum Opinion December 14, 1943, on appeal C.C.A. 5.

Breyer vs. Commissioner, T.C. Memorandum Opinion January 20, 1944, on appeal C.C.A. 3.

Collins vs. Commissioner, T.C. Memorandum Opinion March 13, 1944, on appeal C.C.A. 9.

In the Memorandum Opinion of *Harold F. Pitcairn and Mildred G. Pitcairn, et al, vs. Commissioner*, issued May 22, 1944, the Tax Court had under consideration the collection of a gift tax from donees. The donees contended that the contemplated gift tax deficiency should be deducted from the amount of gift so as to reduce the amount of gift. The Commissioner argued that a donee was "personally liable for (the gift tax of the donor) to the value of such gift." The Tax Court held that there was no provision in the statute authorizing any reduction of gift on account of lien for taxes. The donee received a gift which was a separate matter from his liability for the tax. The gifts were

made prior to 1939. It will be noted that Sec. 316 (a) (1), Revenue Act of 1926, refers to the collection of the liability, at law or in equity, of the transferee of a *decedent or a donor*. If a gift tax paid by a transferee does not reduce the amount of gift, then an estate tax paid by a transferee should not reduce the distribution from the estate, as is claimed by the Commissioner in the present case.

The Commissioner in his brief, pages 7 and 8, indicates that the Tax Court in holding that a transferee was paying his indebtedness predicates its position upon Sec. 900 of the Internal Revenue Code. The Commissioner claims that this is in error as Sec. 900 imposes no liability on anyone, saying (Brief, p. 8): "It simply provides a remedy for the enforcement of a liability, if that liability otherwise exists." Taxpayer agrees with the Commissioner's apparent admission that the liability *otherwise existed*. When taxpayer became a transferee the liability for the tax was imposed upon him by operation of law. Sec. 900 provides that that liability shall be assessed, collected, and paid in the same manner as the deficiency in estate tax. If the estate had paid the deficiency and interest it would have been paying the tax, plus interest, upon its indebtedness. If the transferee pays the deficiency and interest he is paying his liability, plus interest thereon, and that interest paid upon his liability is interest paid upon his indebtedness. What is the difference between *indebtedness* and *liability* if the liability is to pay a certain sum in cash as of a certain date?

Even assuming for purposes of argument that a transferee in paying his legal liability for the amount of deficiency of estate taxes, might not be a substituted taxpayer to the

extent that he is paying the *tax* (although it would appear from Sec. 900 that such would be his status), nevertheless he is a substituted *debtor* who is under a *liability* to pay the tax. It follows that any interest necessarily paid by him because of his delay in paying such indebtedness is deductible interest under Sec. 23 (b).

It may be argued that taxpayer paid the tax voluntarily and that definite liability was not determined against him. It is submitted that he was liable under the law. Some litigation might have been had to attempt to determine a smaller amount of tax, but when the tax was determined by adjudication or by agreement, the amount was the definite liability of the taxpayer. It would be against public policy to require a person, after a satisfactory amount of tax had been agreed upon, to carry on litigation merely to get his liability reduced to judgment in order to prove that the liability imposed upon him was his indebtedness.

(d) If the operation of law did not make the taxpayer herein a substituted taxpayer, but only made him a substituted debtor, he should still be allowed to deduct the full amount of interest paid.

Taxpayers have often been allowed to deduct interest with respect to periods of time prior to the origin of taxpayer or assumption of indebtedness.

Columbia River Paper Mills vs. Commissioner, 43 B.T.A. 104, Affd. 126 Fed. (2d) 1009.

Oregon Pulp & Paper Co. vs. Commission, 47 B.T.A. 772, Petition for Review dismissed November 2, 1943.

Ernst Kern Co. vs. Commissioner, 1 T.C. 249, Petition for Review dismissed (nolle prosequere) September 11, 1944.

Pressed Steel Car Co., Inc., vs. Commissioner, T.C. Memorandum Opinion, August 16, 1944.

The foregoing cases deal principally with reorganizations wherein a new corporation assumes debt of an old corporation, but dates the new obligations back prior to the organization of the new corporation and pays interest on those obligations from such prior date. It has been held that this prior interest is deductible as interest and does not constitute a part of the cost of acquiring properties.

In *Kern Co. vs. Commissioner*, *supra*, the Tax Court held that there was not a statutory reorganization or a non-taxable transfer and stated further upon the authority of the *Columbia River Paper Mills* and *Oregon Pulp & Paper Co.* cases that the statute does not require that the indebtedness upon which interest has accrued and become a liability of a taxpayer must be outstanding during the entire interest accrual period. In the present Green appeal the liability to the Government actually existed and was outstanding and was later assumed by the taxpayer.

It would appear that with respect to transferees of an estate the effect of the law is that there is a forced assumption of a liability arising at a date prior to the origin of status of transferee. By law this liability draws interest from the due date of the estate tax return. The transferee is forced by operation of law to assume this liability and pay interest from a date prior to becoming liable for the indebtedness. If a corporation which voluntarily agrees to assume a debt and pay interest from a date prior to the

voluntary assumption of such debt, can deduct such interest, it would appear that the same theory should apply to a transferee who has a liability forced upon him.

(e) The liability of a transferee may be more than the value of transferred assets plus actual accumulated earnings thereon.

The maximum amount assessable against any one transferee is the lower of the amount of (1) the amount of tax plus interest in accordance with the law to the date of assessment, or (2) the amount received in distribution plus the interest (at rates not exceeding the legal rates) from the date of transfer of property to date of assessment of tax.

Henry Capellini vs. Commissioner, 16 B.T.A. 802.

Wayne Body Corporation vs. Commissioner, 24 B.T.A. 524.

Buzard et al vs. Helvering, 77 Fed. (2d) 391.

Assume that a transferee receives property worth \$10,000.00 and that his net earnings on this property from date of receipt to date of assessment of a transferee tax are \$2,000.00, but that a fair amount of interest on the \$10,000.00 at reasonable rates is \$4,000.00. Assume a transferee tax of \$9,800.00, plus interest of \$5,000.00, or a total of \$14,800.00. The transferee would then be liable for \$14,000.00 of the \$14,800.00, even though his transferred property plus earnings only amounted to \$12,000.00. He would have to go into other earnings for the extra \$2,000.00. Yet the Commissioner apparently claims that a transferee is only paying a liability of another person, and that the transferee is not personally liable.

Of course, in the present case the taxpayer does not have to go into other funds for payment of tax and interest, as the amounts received by him were in excess of the deficiency plus interest. However the question of whether or not a transferee is paying his indebtedness, or the indebtedness of an estate, or has any personal liability in connection with tax deficiency and interest, can not be made to depend upon either his individual ability or economic conditions which affect the earning power of the transferred assets, or upon the amount of transferred assets as compared with the liability imposed upon him.

(f) "Indebtedness" under Sec. 23 (b) of the Internal Revenue Code is not necessarily restricted to liabilities originated by the taxpayer, or with respect to which collection may be enforced from any property owned by him.

In several places in his brief, the Commissioner apparently denies that the estate tax liability of the transferee constituted a *personal liability or obligation* of taxpayer transferee. But under Sec. 23 (b) it is not necessary that the interest be required to be paid on a personal liability or obligation of taxpayer. The Commissioner does not define his term "personal obligation or liability." It is presumed that he claims it does not include a liability which was not originated by the taxpayer or with respect to which there is not an unlimited general obligation of taxpayer.

However, the term "indebtedness" as used in Sec. 23 (b) is broad enough to include an indebtedness which may not have arisen as an indebtedness of the taxpayer, but which

the taxpayer later constructively assumes by reason of operation of law, or some contract in which he was not a party. For a taxpayer to claim a deduction of interest paid by him which is currently accrued, it is not necessary that he be originally liable for the payment of a debt but only that he is liable for the payment when the debt is made. See *Scripps vs. Commissioner*, 96 Fed. (2d) 492, *Penrose vs. U. S.*, 18 Fed. Supp. 413, *New McDermott, Inc., vs. Commissioner*, 44 B.T.A. 1035.

It is possible that when a transferee pays an estate tax deficiency he may not be paying a tax which would be deductible in ascertaining net income if estate taxes were allowed as an income tax deduction, which they are not, but there is no attempt herein to deduct the tax. Taxpayer requests only the deduction of the interest paid on this liability.

Sec. 315 (b) of the Revenue Act of 1926 contained a provision wherein certain classes of transferees (arising before death of decedent) including beneficiaries of insurance policies became personally liable for the tax to the extent of their interest in transferred property if the estate tax was not paid. Presumably this was because of difficulty of enforcing liability and collection by suits involving trust fund doctrine. This section was reenacted as Sec. 827 (b) of the Code, and Sec. 827 (b) of the Code was amended by Sec. 411 (a) of the Revenue Act of 1942 so that it read as follows:

“Liability of Transferee, etc.—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of

the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under Section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. * * *"

The report of the House Committee on Ways and Means, Cum. Bull. 1942-2, 372, 495, indicates that the new section clarifies and consolidates provisions of the law. The old section 827 (b) of the Code imposed personal liability for transfers in contemplation of death or to take effect at or after death, but all of the assets in Sec. 811 were treated equally for inclusion in the gross estate, and the holders or recipients of such assets were accordingly placed on the same plane of personal liability for the tax.

It would appear that the imposition of personal liability on transferees who were distributees of an estate presented no new or radical departure in the law. They were already liable at law or in equity for the tax to the extent of the value of property transferred at date of death.

In *Fox vs. Commissioner*, 43 B.T.A. 895, petitioner's husband had in a prior year assigned certain life insurance policies to her. The husband had previously borrowed on the policies and overdue interest had been added to the loans. During the taxable year under consideration the petitioner had paid old interest and current interest. The Commissioner had disallowed that portion of interest which accrued prior to the date of assignment, but had allowed deduction for interest accruing after date of assignment, notwithstanding the fact that the husband and not the petitioner

was the maker of the loans. The Board of Tax Appeals sustained the Commissioner. The Commissioner in his present brief, page 7, states that there is only one situation in which a deduction is allowable to one who is not personally liable on a principal debt, namely where the owner of property subject to a mortgage pays the interest on the mortgage. It is submitted that in the *Fox* case the Commissioner himself allowed one who was not personally liable on a principal debt to deduct interest from date of transfer and did not contest her right to do so. He only objected to the deduction of payments of amounts accumulated as interest prior to date of transfer. In other words, in *Fox vs. Commissioner* the Commissioner himself took the identical position now taken by the Tax Court in the decision from which the Commissioner is appealing!

Suppose a taxpayer acquires property from an estate on which there had been a mechanic's lien for repairs. The lien is primarily enforceable only against the property, but it is the indebtedness of the transferee's property and he is secondarily liable. He must pay the indebtedness or suffer loss of property. The payment of the principal amount of repairs may not be deducted by taxpayer as repairs as it would be an additional cost of property, but the interest paid on such liability or indebtedness, especially the amount accruing since date of transfer, is an interest deduction for such taxpayer. Another illustration would be property taxes imposed against property before date of transfer. The principal of taxes might not be deductible as *taxes*, but would be a capital item as differentiated from expenses, but

the interest on the delinquent taxes caused by taxpayer's delay in payment would be deductible interest.

Another common illustration is a real estate mortgage against an acquired property. Assume that in the present case taxpayer had received in distribution of his father's estate a tract of real estate against which there was a mortgage of \$10,000.00. The mortgage would not be a direct personal liability of transferee taxpayer, but it would be his indirect indebtedness because of being a lien against his land. It has always been clear that such interest paid or accrued subsequent to transfer would be an allowable deduction for transferee, except, possibly, the amount of interest that accrued prior to date of transfer. The transfer of an equity in mortgaged property is so common an occurrence that the Commissioner has for many years had a regulation allowing the owner of real estate to deduct interest on a mortgage indebtedness for which the taxpayer was not originally directly or personally liable. Sec. 29.23 (b)—1 Reg. 111. This portion of the regulations shows that a taxpayer can deduct interest in connection with a lien against property owned by him and the regulations do not specifically limit the deduction of such interest to the lien of a real estate mortgage. The theory applies to a chattel mortgage or any other form of lien or indebtedness against the property of a taxpayer even though the taxpayer may not have personally caused such liability to arise and although his liability may be limited to the recourse of creditor against the specific property. It appears that the interest on all such indirect liabilities has been consistently allowed by the Commissioner as a deduction, with the single exception

of interest with respect to a lien for federal taxes against the property of a transferee.

(g) Taxpayer was executor of father's estate and as such he was personally liable under Sec. 3467 R.S. in addition to being liable as a transferee.

The Commissioner, in his brief, tries to show that there was no personal liability for estate tax deficiency in connection with being a transferee. Sec. 3467, Revised Statutes, provides that every executor who paid any debt of the estate without paying debts to the United States from the estate "shall become answerable in his own person and estate" for the amount of debts due to the United States. As hereinabove pointed out such personal liability is not necessary to make the estate tax deficiency an indebtedness under Sec. 23 (b), but if such personal liability is necessary, then the taxpayer in this case had such personal liability.

(h) Taxpayer was reporting on a cash basis and should deduct full accrual of interest when paid.

The Tax Court held that taxpayer could only deduct the interest which accrued after the date he became transferee. In this particular case practically all of the interest pertained to the period after distribution of the estate. The amount accruing for the period between the date when the estate tax should have been paid and the date of distribution of estate is only nominal. It is contended on behalf of taxpayer, however, that the full amount of interest paid should have been allowed as a deduction.

If a taxpayer assumes an indebtedness of a vendor in

connection with acquiring property, it is true that the interest which might be accrued at date of assumption of such indebtedness constitutes purchase of property for taxpayer and can not be deducted as interest under Sec. 23 (b) regardless of whether taxpayer was on cash or accrual basis. But the reason for this rule is that under fixed legal and accounting principles the interest accrues proratably over a period of time. With respect to federal tax deficiencies or refunds, however, the interest does not accrue proratably over a period of time, but accrues within the taxable year when the amount of deficiency is finally adjudicated or agreed upon or within the year when the certificate of over-assessment is issued by the Commissioner.

I.T. 3491, 1941-2 C.B. 177.

G.C.M. 9575, X-1 C.B. 381.

Street & Smith Publications, Inc., vs. U. S., 38 Fed. Supp. 461.

I.T. 2210, IV-2 C.B. 43.

The present taxpayer returned his net income on the cash receipts and disbursements basis instead of accrual, and it would appear that the discussion of accrual of interest on estate tax deficiency is not pertinent to the present case because he was on a cash basis and could take the full amount as a deduction in the year when paid.

(i) Interest received by a transferee with respect to a refund of estate taxes would be taxable income of transferee, and not receipt of non-taxable principal of estate; the same rules should govern the payment of interest upon a deficiency.

Interest paid on indebtedness is a deduction. Interest received is income. In connection with the question of the status of interest paid by a transferee in connection with a deficiency of estate taxes, it might be pertinent to consider the status of interest received by a transferee in connection with the refund of an overpayment of estate taxes originally paid by the estate.

The Commissioner contends that whenever a transferee pays the liability imposed upon him for estate tax deficiency and interest, that he is not paying his indebtedness and has no deduction for interest, but is paying an indebtedness of the estate which constitutes in entirety a reduction of his distribution received from estate. To be consistent, in connection with a refund of estate taxes and interest, the Commissioner would be obliged to rule that the transferee was receiving assets of the estate in the amount of both principal and interest as an additional distribution from the estate, which additional distribution would be a non-taxable receipt to transferee, both with respect to principal and interest. We have been unable to find any such ruling. Apparently it is so obvious that the interest is taxable income to the transferee that no question has arisen.

It is submitted that in the case of a refund the Commissioner would contend that the transferee was taxable on the interest, either (a) as an earning on the assets of the right to claim a refund distributed to him in settlement of estate, or (b) that under the trust fund doctrine the interest was first constructively received by a somewhat dormant trust, and was then constructively distributed to taxpayer transferee, and then became taxable income for transferee.

In this connection it has been ruled, and the ruling consistently followed, that interest in connection with a refund of federal taxes constitutes taxable income in the year when received for a taxpayer on the cash basis, and in the year when the certificate of overassessment is issued for taxpayer on the accrual basis. The accrual occurs at the time certificate for overassessment is issued. I. T. 2210, IV-2 C.B. p. 43 issued in 1925. On this principal interest paid is an allowable deduction.

II.

ON THE TRUST FUND THEORY THE GROSS INCOME OF TAXPAYER SHOULD BE REDUCED BY THE AMOUNT OF INTEREST PAID WITH RESPECT TO THE ESTATE OR ANY TRUST ARISING FROM DISTRIBUTION OF THE ESTATE.

(a) If, under the so-called "trust fund doctrine" a transferee taxpayer, when paying an estate tax deficiency and interest, is only paying the liability of the estate instead of his indebtedness and interest, and therefore can not deduct the interest himself, then the taxpayer's gross income for 1939, derived from the trust of properties transferred from the estate, should be reduced by the interest paid for the estate in 1939.

The Commissioner apparently contends that the taxpayer transferee, when paying liability imposed upon him with respect to taxes originally assessable against transferor, is

paying a debt of transferor out of funds or property received by transferee from transferor.

Under the so-called "trust fund doctrine," when a transferee receives property, the property is impressed with a trust in favor of any creditors, disclosed or undisclosed, of the transferor. This trust, however, remains dormant or inert unless and until some creditor of transferor makes a claim under the trust fund doctrine against the transferee. The trust then comes into action to provide equitable relief for the creditor of transferor.

Under income tax laws, if the income of a trust is accumulated for later distribution, an income tax is imposed for that year upon the trust, but if the income is distributed, the tax upon such distributed income is imposed upon the persons receiving such distribution. It would therefore appear that under the trust fund doctrine the transferee holds the transferred property in trust and receives the income from it just the same as if no trust fund existed as long as no creditor brings the trust fund doctrine into action. If and whenever a creditor uses the trust fund doctrine and the transferee "disgorges" (to use the phrase adopted in the Commissioner's brief), there is a payment of principal and interest of debt of the trust. Under federal income tax laws regarding taxation of trusts, the interest would be deductible by the trust from any income received by the trust. If transferee held transferred assets impressed with the trust with respect to which gross income of \$15,000.00 was received in the taxable year, and if in the same taxable year \$5,000.00 of interest deduction was paid for the trust then the transferee would receive distribution of taxable

income from the trust in the amount of \$10,000.00, and not \$15,000.00.

In the present case some of the properties received by transferee from his father's estate had been sold and proceeds converted into other investments and the gross income from the transferred assets or substituted assets was far in excess of the amount of interest paid with respect to the tax deficiency. The dividends received by taxpayer in 1939 from capital stock of one corporation, which was received by taxpayer from his father's estate and had been continuously held by him through 1939 was almost double the amount of designated interest paid with respect to estate tax deficiency. (R. 42)

If the Commissioner's contentions are sustained that under the trust fund doctrine taxpayer was paying debt and interest of the trust which arose by the distribution of the estate, then it is contended that taxpayer should not include in the gross income all of the gross income received by properties impressed by the trust, but that there should be deducted from such gross income the interest paid in 1939 for the trust, and therefore in 1939 taxpayer's distributable share of income from the trust was \$4,143.00 less than the amount which was included in gross income.

This allegation of error was raised before The Tax Court in an amended petition (R. 18).

The reduction of the amount of gross income by amount of interest paid will, of course, reduce the net income. There appears to be no question that \$4,143.00 interest was paid on an indebtedness. If this indebtedness was the indebtedness of taxpayer then he is entitled to the deduction of the

amount of interest paid. If the interest was paid on indebtedness of a trust, then the gross dividend income constructively received by taxpayer from trust property would be reduced by the amount of the interest.

The Commissioner, in his brief, relies considerably on *Koch vs. U. S.*, 138 Fed. (2d) 850. In that case the stockholders of a dissolved Kansas corporation paid an income tax deficiency plus interest computed upon the corporation net income. The court indicated that the tax and interest was paid, not from their own funds, but with assets of the corporation held by them as trustees, and to which the Government, as a creditor, had a prior claim. In discussing *Penrose vs. U. S.*, 18 Fed. Supp. 413, the Court indicated that if Koch and the other stockholders had paid the interest out of income derived from assets transferred from the corporation or if they were asserting that they did not realize income as dividends in 1931 from the assets of the company distributing them to the extent that such assets were used to pay liabilities of the company, then the *Penrose* case might apply, but that the record in the *Koch* case presented no such issue.

In the present Green case, if the interest was paid by taxpayer out of the trust, then the payment of such interest reduces the amount of income constructively received from the assets held by the trust.

It may be of interest to note that in *Koch vs. U. S.*, *supra*, the Court said: "Where the trust property has been used by the stockholder for his own purpose, or disposed of by him, he may be held *personally liable* for the full value thereof." (Emphasis supplied.) In the present Green case there was an intermingling of estate assets with other personal assets

and the capital stock of one corporation had been sold and proceeds reinvested, but there remained the capital stock of another corporation received from the estate, the income from which was much in excess of the interest payment in controversy. From the statements of the Court in the *Koch* case, it would appear that under some conditions a transferee could become personally liable for an indebtedness of the transferor carried over against the trust. If the Commissioner should contend that the taxpayer has taken over the assets of the trust fund to such extent that the trust fund has been depleted, the transferee taxpayer would be liable for the full value thereof as indicated by the court in *Koch* vs. *U. S.* *supra*, and citations given therein including *McWilliams* vs. *Excelsior Coal Company*, 298 Fed. 884 (C. C. A. 8).

In the event the question should arise as to whether or not the trust income and deductions should be considered on the cash or accrual basis to determine the amount of net income constructively distributed to taxpayer and taxable to him, it is contended that it does not make any difference whether cash or accrual basis is used. The income of dividends received from stock of one corporation would be taxable in 1939 and that income alone was considerably in excess of the interest deduction without even considering other income that might have come to taxpayer impressed with the taint of trust fund. Regarding deductions, on an accrual basis, the interest on deficiency did not accrue until the deficiency was determined by agreement in 1939. Considered from a cash receipts and disbursements basis, it was *paid* in 1939. Under either method the interest would be a deduction.

If the trust fund doctrine is accepted the *entire amount* of

interest would be taken into consideration as a reduction of gross income constructively received from the trust and there would be no prorating of interest with respect to periods before and after the date taxpayer became a transferee.

The estate tax deficiency was an indebtedness and the interest paid thereon should be an allowable deduction for some person. If, by the operation of the law, a trust existed to such an extent that the interest could be deducted only by the trust, then the income from properties of the trust should be passed through the trust and be reduced by the interest deduction before being taxable income for the beneficiary of the trust.

CONCLUSION

Either the taxpayer paid interest on his own indebtedness or else under the trust fund theory the gross income with which he is charged should be reduced by the interest paid for the estate in 1939. On either theory the taxpayer is entitled to an allowance for the interest paid.

Respectfully submitted,

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No. 10810

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

LAWRENCE R. GREEN, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

REPLY BRIEF FOR THE PETITIONER

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FILED

FEB - 1 1945

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 10810

COMMISSIONER OF INTERNAL REVENUE, PETITIONER
v.

LAWRENCE R. GREEN, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

QUESTION PRESENTED

Whether Section 3467 of the Revised Statutes imposes a tax liability upon an executor in the place of the tax liability of the estate of his decedent, which the executor has failed to pay before distributing the estate, and hence a liability for interest *qua* interest in respect thereof.

STATUTES INVOLVED

These are set out in the Argument, *infra*.

STATEMENT

While the taxpayer, Lawrence R. Green, was, with his brother Ralph J. Green, a co-equal beneficiary of the estate of his deceased father, and hence, as we argue in our brief in chief, a transferee of his estate

within the meaning of Section 900 (a) (1) of the Internal Revenue Code, the taxpayer was also the executor of his father's estate and hence liable, as such, as he asserts, to the United States under Section 3467 of the Revised Statutes.

ARGUMENT

Section 3467 of the Revised Statutes imposes no tax liability upon an executor in the place of the tax liability of the estate of his decedent, which the executor has failed to pay before distributing the estate, and hence no liability for interest *qua* interest in respect thereof

Since the briefs in chief in this case were written, and on January 8, 1945, the United States Circuit Court of Appeals for the Eighth Circuit has reversed the decision of the Tax Court so far as it concerns the tax liability of the taxpayer's brother, Ralph J. Green. *Nunan v. Green*, decided January 8, 1945. We think there is no reason why this Court should refuse to follow that decision, in so far as it holds erroneous the Tax Court's decision upon the basis on which it was rendered. For the cases of the two brothers were decided by the Tax Court upon the same basis, namely, that Section 900 (a) (1) of the Internal Revenue Code (substantially identical with Section 316 (a) (1) of the Revenue Act of 1926, c. 27, 44 Stat. 9) imposes a new liability upon a transferee for the payment of interest *qua* interest upon the transferor's tax liability subsequent to the transfer, although not before, and does not merely give the Commissioner a new remedy to enforce the transferee's liability, at law or in equity, for both the tax and interest thereon, as

well as other charges against him arising out of the transferor's tax liability.

However, the taxpayer, for the first time here, asserts (Br. 24) that, as executor of his father's will, he became personally liable for both the tax and the interest thereon, *qua* tax and interest; that is, that he became liable therefor because he was delinquent in his duties of executor, and apart from his transferee liability at law or in equity, resulting from the fact that a part of the estate had been distributed to him as beneficiary under the decedent's will. The taxpayer points out that Section 3467 of the Revised Statutes provides in this behalf that every executor who pays any debt of the estate without paying a debt to the United States from the estate "shall become answerable in his own person and estate" for the debt so due the United States. The taxpayer does not, however, appear here to rely upon the case of *Toy v. Commissioner*, 34 B. T. A. 877, which was decided under that section, and upon which he otherwise relies in support of his contention that he became liable for the tax and interest as a transferee. Moreover, the Tax Court cited the *Toy* case only in support of its holding that the transferee section (Section 900 (a) (1) of the Code) imposed a liability to pay interest *qua* interest upon the transferee. This is made clear when it is considered that the case was cited as authority for this also in the *Ralph J. Green* case, in which the liability of an executor under Section 3467 could not have been invoked. The same is true of the citation of the *Toy* case by the Tax Court in the other

cases in which it rendered similar decisions, namely, *Koppers Co. v. Commissioner*, 3 T. C. 62, and *Breyer v. Commissioner*, decided January 20, 1944, both pending on appeal in the Circuit Court of Appeals for the Third Circuit, and *Henderson v. Commissioner*, decided December 14, 1943, pending on appeal in the Circuit Court of Appeals for the Fifth Circuit.

Since the taxpayer's buttressing contention, based on Section 3467, was not made in or considered by the Tax Court, it was not necessary for the Government to do more in its opening brief than to distinguish the *Toy* case. This we did (Br. 13-14) on the ground that, unlike Section 900 (a) (1) of the Internal Revenue Code, Section 3467 made an executor personally liable for the tax—plus interest thereon, of course. But as we also there pointed out, the correctness of the decision in the *Toy* case was, in our opinion, open to doubt, as, indeed, Judge Turner had already stated in his dissenting opinion. (R. 36-37.) Moreover, it is questionable whether the issue based on Section 3467 can be raised in this proceeding, since here, but unlike the *Toy* case, the Commissioner did not proceed against the taxpayer thereunder. (R. 21.) The liability of a fiduciary hereunder is different from the liability of a transferee. Under Section 3467 it extends to the value of the entire estate, whereas a transferee's liability is limited to the value of the property he has received. Also the defenses may be different. Cf. *Moore v. Commissioner* (C. C. A. 2d), decided January 18, 1945.

In any event, the decision in the *Toy* case is wrong, for, as Judge Turner said, the fiduciary's liability

under Section 3467 is “in the nature of a penalty for the wrongful act of a fiduciary in making distribution of a trust estate before satisfying the liability of the estate to the Government for tax and interest.” And, as Judge Turner further said (R. 37), such tax and interest are merely the measure of the penalty imposed and not “[as to] the fiduciary tax and interest.”

The taxpayer’s additional contention here brings two further provisions of the law into consideration in addition to those set out in the Government’s main brief. The first is Sections 3466 and 3467 of the Revised Statutes, the latter already adverted to, which are as follows:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding; concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (31 U. S. C. 1940 ed., Sec. 191.)

SEC. 3467. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in

his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (31 U. S. C. 1940 ed., Sec. 192.)

The second is Section 900 (a) (2) of the Internal Revenue Code, identical with Section 316 of the Revenue Act of 1926, which reads as follows:

SEC. 900. TRANSFERRED ASSETS.

(a) *Method of Collection*.—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this subchapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

* * * * *

(2) *Fiduciaries*.—The liability of a fiduciary under section 3467 of the Revised Statutes (U. S. C., Title 31, § 192) in respect of the payment of any such tax from the estate of the decedent.

* * * * *

(26 U. S. C. 1940 ed., Sec. 900.)

First as regards Sections 3466 and 3467 of the Revised Statutes. Both of these sections, and not alone Section 3467, are here involved, for they are to be read in *pari materia*. *United States v. Butterworth Corp.*, 269 U. S. 504, 513; *Bramwell v. U. S. Fidelity*

Co., 269 U. S. 483, where the Court in this behalf said (p. 490):

The persons held are "every executor, administrator, or assignee, or *other person*." The generality of the language is significant. Taken together, these sections mean that a debt due the United States is required first to be satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent, as the rights and priorities of creditors may be made to appear.

Thus, while, as we shall endeavor to show, Section 3466 was designed to give a debt owing the United States a priority where the property of an insolvent debtor was in the hands of an assignee or other fiduciary, Section 3467 was designed to impose a personal liability upon such fiduciary, to insure the Government such priority, in the event he disposed of the debtor's property without having first discharged such debt.

As stated, Section 3466 which derives from Section 5 of the Act of March 3, 1797, c. 20, 1 Stat. 512, 515, creates only a right in the United States to priority for the payment of a debt due it. *United States v. Oklahoma*, 261 U. S. 253; *United States v. Fisher*, 2 Cranch 358; *In re C. J. Rowe & Bros.*, 18 F. 2d 658 (W. D. Pa.); *United States v. Emory*, 314 U. S. 423, 426; *United States v. Texas*, 314 U. S. 480, 483, *et seq.* Hence, it accomplishes no more than to make the debt due the United States by a decedent's estate for taxes a privileged debt. G. C. M. 824, V-2 Cum. Bull.

54 (1926). It does not convert the fiduciary into an original debtor, nor make the debt that of the fiduciary. The latter is liable only for his failure duly to regard the rights of the United States to have a debt due it by the decedent or his estate accorded priority as and when required by the section. Accordingly, under Section 3466 the fiduciary who becomes vested with title to the debtor's property is thereby made trustee for the United States and is bound to pay the debt first out of the proceeds of the debtor's property. *Beaston v. Farmers' Bank*, 12 Pet. 102, 133; *United States v. Oklahoma*, *supra*, p. 260; *Bramwell v. U. S. Fidelity Co.*, *supra*, p. 488; *United States v. Clark*, 25 Fed. Cas. No. 14,807. The case thus presented is that of a trust fund—a trustee holding and a *cestui qui trust* claiming it—and the same remedies are applicable as if the fund had arisen and the trustee had been appointed in any other way. *Lewis v. United States*, 92 U. S. 618, 622, citing *inter alia*, *Beaston v. Farmers' Bank*, *supra*, and *Thelussou v. Smith*, 2 Wheat. 396, 425. While undoubtedly the liability may be enforced against the delinquent fiduciary in equity, it is also enforceable against him at law. The action at law by which it is to be enforced is assumpsit for money had and received, founded upon a breach of duty of the fiduciary. *United States v. Dewey*, 39 Fed. 251 (S. D. N. Y.).*

*Apparently Congress thought the action sounded in tort, for so it explained in providing for the enforcement of the right by the administrative procedure provided by Section 900 (a) (2) of the Internal Revenue Code above set out and hereinafter discussed. under which the amount of the deficiency determined

In any case, it is not an action for debt upon a tax vicariously owed by the fiduciary, together with interest *qua* interest. Moreover, the fiduciary's liability is limited by the nature of the assets that came into his hands. *United States v. Barnes*, 31 Fed. 705, 707 (S. D. N. Y.).

While, as stated, Section 3466 derives from the Act of March 3, 1797, it was the Act of March 2, 1799, c. 22, 1 Stat. 627, Section 65, which first introduced the provisions of Section 3467, specifically making every executor, administrator, assignee or other person answerable for failure to pay the United States. But the revision did not involve any substantial change of phraseology and did not work any change in the purpose or meaning of the priority act. *Buck Stove Co. v. Vickers*, 226 U. S. 205, 213; *Price v. United States*, 269 U. S. 492, 501. And, as the Court further said in the *Price* case (p. 501), there is no reason for any distinction in respect of priority between taxes and other amounts owing to the United States. In other words, so far as concerns Sections 3466 and 3467, taxes due the United States are regarded as an ordinary debt which is no different from any other debt. Thus, no one would contend that if the debt due the United States by the decedent or his estate was on a contract, the executor would by virtue of these sections be substituted for him or it as a party thereto. Similarly, it can not be said that the ex-

against the decedent or his estate—tax and interest—is the measure of that right. See H. Conference Rep. No. 356, 69th Cong., 1st Sess., pp. 44–45 (1939–1 Cum. Bull. (Part 2) 361, 372).

ecutor is substituted under the section as the taxpayer in the place of him who owns the tax and the interest thereon. There is nothing in the decisions of the Supreme Court or of those of the lower federal courts which justifies a contrary conclusion. In fact, the only case holding to the contrary is the *Toy* case. But that case rests upon the obviously erroneous assimilation by the Tax Court of an executor's liability under Section 3467 to the liability of one who receives property and assumes the burden of paying the mortgage thereon.

Turning then to Section 900 (a) (2) of the Internal Revenue Code (same as Section 316 (a) (2)), it is also well settled that the summary method thereby provided for the enforcement of the fiduciary's liability to the United States under Section 3467 did not create a new obligation. *United States v. First Huntington Nat. Bank*, 34 F. Supp. 578, 581 (S. D. W. Va.), affirmed *per curiam*, 117 F. 2d 376 (C. C. A. 4th). In support of this view, the District Court cited not only *Phillips v. Commissioner*, 283 U. S. 589, which is cited in the Government's main brief (p. 11) to that effect, but two decisions of this Court, namely, *Leighton v. United States*, 61 F. 2d 530, and *Rosenberg v. McLaughlin*, 66 F. 2d 271, certiorari denied *sub nom. Rosenberg v. Lewis*, 290 U. S. 696.

We therefore submit that the recovery on the liability imposed by Section 3467, whether enforced at law or in equity or under the provisions of Section 900 (a) (2) of the Internal Revenue Code, is limited to the value of the estate which came into the fidu-

ciary's hands. It is also for this reason that, before a recovery can be had, under Section 3467, the United States must allege and prove the insufficiency of the assets of the estate to pay the decedent's debt to the United States. *United States v. Giger*, 26 F. Supp. 624 (W. D. Ark.). This is precisely the same proof that must be made to establish a transferee's liability at law or in equity. See *Phillips v. Commissioner*, *supra*, pp. 604-605.

So far we have sought to show that Section 3467 imposes no more than a liability in equity under the trust fund doctrine, or at law for money had and received, from which it necessarily follows that such liability is merely measured by the tax and interest owing by the decedent or his estate. So that whatever may be collected from the fiduciary by way of interest is collected as a part of such liability and not *qua* interest. A number of the decisions of the Board of Tax Appeals support this view. *Bettendorf v. Commissioner*, 3 B. T. A. 378; *Lang v. Commissioner*, 45 B. T. A. 256. The attempt of the Tax Court to distinguish the *Toy* case from the *Bettendorf* case on the ground that the deductibility of the disputed interest payments in the latter rested solely on the petitioner's status as a distributee or transferee, whereas its deductibility in the former rested solely upon the petitioner's liability under Section 3467, manifestly merely assumes the point in issue.

CONCLUSION

It is therefore respectfully submitted that Section 3467 does not, any more than does Section 900 (a) (2)

of the Internal Revenue Code, impose either a tax liability as such upon the fiduciary or a liability to pay interest *qua* interest thereon. And, since, as we contend in our opening brief, no such liability is imposed upon the taxpayer as a transferee under Section 900 (a) (1) of the Internal Revenue Code, the decision of the Tax Court should be reversed.

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JANUARY, 1945.



